(28,986)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 436.

SUPERIOR WATER, LIGHT & POWER COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF SUPERIOR AND F. A. BAXTER, AS MAYOR, ET AL., &c.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1922.

1 Supreme Court of Wisconsin.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff in Error,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'HARE and Fred C. Tomlinson, as Councilmen, of said City of Superior, Defendants in Error.

Petition for Writ of Error.

The petition of the above named plaintiff in error, Superior Water, Light & Power Company, which is a corporation organized and existing under the laws of the State of Wisconsin, respectfully represents:

1. That on or about December 6, 1918, your petitioner commenced an action against the above named defendants in error, in the Circuit Court for Douglas County, in the State of Wisconsin, wherein and whereby petitioner sought to restrain the defendants from proceeding further with then pending proceedings of the defendant city before the Railroad Commission of Wisconsin to acquire by condemnation the water-works property and system of plaintiff (part of which was located in the City of Superior and part in the State of Minnesota), under the provisions of Sections 1797*m*-1 to 1797*m*-109 of the statutes of Wisconsin, such action being brought upon the grounds that such attempted acquisition, and the state statutes under which the City was proceeding, were in contravention of a lawful contract between petitioner and the defendant City with respect to the acquisition of the property of petitioner, and that neither under such statutes, nor otherwise than pursuant to said contract, did the City have power to acquire, without the consent of petitioner, its said water-works property and system, and that the attempted acquisition, and the statutes under which the same was sought were in contravention of rights guaranteed to petitioner by the Constitution of the United States, and particularly Section 10 of Article I thereof, and Section 8 of Article I thereof, and Section 1 of Article XIV of the amendments to said Constitution; and that in said action petitioner also sought to compel the defendants to specifically perform said contract.

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2. That the original complaint of the plaintiff in said action was amended, the grounds for said action, and the facts upon which the same were based, being averred therein, and that to such amended complaint the defendants interposed a demurrer upon the ground that said amended complaint did not state facts sufficient to constitute a cause of action.

3. That thereafter, and on or about December 24, 1919, said Circuit Court for Douglas County made an order overruling the demurrer to said amended complaint, and allowing the defendants leave to

serve an answer in said action; that defendants thereupon appealed from said order of said Circuit Court to the Supreme Court of Wisconsin, which is the highest court of the state, which court, on or about January 11, 1921, reversed said order of the Circuit Court and remanded the cause with directions to the lower court to sustain the demurrer. Thereupon, the plaintiff in said action filed a motion for a rehearing, a rehearing was ordered upon two of the questions involved, reargument was had, and on May 31, 1921, said Supreme Court rendered a decision sustaining its previous mandate. That upon the remanding of the record to said Circuit Court for Douglas County, such court, in accordance with the mandate of the Supreme Court, entered an order on July 22, 1921, sustaining said demurrer to the amended complaint and giving to the plaintiff leave to serve a further amended complaint. That plaintiff not electing
3 to plead over, said Circuit Court for Douglas County entered final judgment on September 26, 1921, dismissing the action with costs against the plaintiff. That plaintiff thereupon appealed from said final judgment to said Supreme Court of the State of Wisconsin, which court, on April 11, 1922, affirmed said final judgment.

4. Your petitioner further represents that in said action there is drawn in question the validity of statutes of the State of Wisconsin and of authority exercised under the State of Wisconsin, on the ground of their being repugnant to the constitution and laws of the United States, and said decision and judgment of said Supreme Court of Wisconsin was and is in favor of the validity of such state statutes and the authority exercised thereunder.

5. Your petitioner further represents that the decision and judgment of the Supreme Court of Wisconsin, affirming the final judgment of the court below, was and is a final judgment of the highest court of the State of Wisconsin in which a decision in said cause might be had; and your petitioner complains that in the record and proceedings had in said cause, and in the rendition of said final judgment and decision of said Supreme Court of the State of Wisconsin, manifest error was committed to the great damage of your petitioner, all of which will more in detail appear from the assignment of errors presented and filed herewith.

Wherefore, your petitioner being aggrieved by the said final decision of the Supreme Court of Wisconsin, prays a writ of error from the said decision and judgment to the Supreme Court of the United States, and for an order fixing the amount of a supersedeas bond.

GRACE, FRIDLEY & CRAWFORD,
CHARLES R. FRIDLEY,
W. P. CRAWFORD,
Attorneys for Plaintiff in Error.

Superior, Wisconsin.

HARRY L. BUTLER, *Of Counsel.*

Madison, Wisconsin.

4 STATE OF WISCONSIN, *ss:*

In Supreme Court.

Let the writ of error issue upon the execution of a bond by Superior Water, Light & Power Company to the City of Superior in the sum of $1,000.00; such bond when approved to act as a supersedeas.

Dated May 18, 1922.

[Seal of Supreme Court of Wisconsin.]

AAD JOHN VINJE,
Chief Justice of the Supreme Court of the State of Wisconsin.

5 [Endorsed:] Supreme Court of Wisconsin. Superior Water, Light & Power Company, Plaintiff in Error, vs. City of Superior, et al., Defendants in Error. Petition for writ of error. Original. Filed May 18, 1922. Arthur A. McLeod, Clerk of Supreme Court, Wis.

6 Supreme Court of Wisconsin.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff in Error,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'HARE and Fred C. Tomlinson, as Councilmen, of said City of Superior, Defendants in Error.

Assignment of Errors.

Now comes the above named plaintiff in error and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings in the said action, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

1. The Supreme Court of Wisconsin erred in holding and deciding that the franchise contract under which the plaintiff claimed (as set forth in the amended complaint) was not protected from impairment by the State of Wisconsin.

2. The Supreme Court of Wisconsin erred in holding and deciding that Section 1797*m*-77 Wisconsin Statutes was not invalid as impairing the obligations of the said franchise contract.

3. The Supreme Court of Wisconsin erred in holding and deciding that, notwithstanding said franchise contract, and without the consent of the plaintiff, the State of Wisconsin could lawfully confer upon the defendant city the power or authority to acquire or con-

demn the property of the plaintiff, under Sections 1797*m*-1 to 1797*m*-109 inclusive, and particularly under Sections 1797-*m*-77, 1797*m*-79, 1797*m*-80, 1797*m*-81 and 81 (*a*), 1797*m*-82 and 1797*m*-83 to 1797*m*-86 inclusive, of the Statutes of Wisconsin; and in holding and deciding that in attempting to confer such right of
7 acquisition said statutes were not invalid on the ground that they were repugnant to the Constitution of the United States, and in contravention thereof; and particularly in contravention of Section 10 of Article I, prohibiting any state from impairing the obligation of a contract, and of Section 8 of Article I, being the commerce clause, and of the provisions of Section 1 of Article XIV, prohibiting any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and which prohibits any state from depriving any person of property without due process of law, and which prohibits any state from denying to any person within its jurisdiction the equal protection of the laws.

4. The Supreme Court of Wisconsin erred in holding and deciding that the proceedings for the acquisition or condemnation of the property of plaintiff, sought to be restrained in said action, and the state statutes upon which they were based, were not invalid on the ground of being repugnant to the Constitution of the United States and in contravention thereof, and particularly in contravention of the provisions thereof above referred to.

5. The Supreme Court of Wisconsin erred in holding and deciding that the proceedings by the defendant city for the acquisition of the property of the plaintiff, Superior Water, Light & Power Company, which were sought to be restrained in said action, and the statutes of Wisconsin upon which they were based, (particularly said Sections 1797*m*-77, 1797*m*-79, 1797*m*-80, 1797*m*-81 and 1797*m*-82) were not invalid, and in contravention of, and repugnant to, Section 10 of Article I and Section 8 of Article I, of the Constitution of the United States, and Section 1 of Article XIV of the amendments to the Constitution of the United States.

6. The Supreme Court of Wisconsin erred in holding and deciding that the application of the so-called reserve clause of the Wis-
8 consin Constitution, (Section 1 of Article XI thereof) to contract or property rights of plaintiff, Superior Water, Light & Power Company, was not in contravention of the Constitution of the United States, and particularly of the provisions thereof and of the amendments thereto, above referred to.

7. The Supreme Court of Wisconsin erred in holding and deciding that in virtue of said reserve clause of the Wisconsin Constitution (Section 1 of Article XI thereof) or in virtue of any statute of the state, the property of plaintiff, Superior Water, Light & Power Company, located in the State of Minnesota, could be acquired or condemned without the consent of plaintiff, or that, in the presence of said ordinance contract, any part of the property of plaintiff, whether located within or without the State of Wisconsin, could be

acquired or taken without the consent of plaintiff, and in holding and deciding that insofar as the Constitution or statutes of the State sought to confer such right of acquisition or condemnation the same and all proceedings thereunder, were not invalid as in contravention of and repugnant to the Constitution of the United States, and particularly the provisions thereof, and of the amendments thereto, above specifically referred to.

For which errors, the plaintiff in error, Superior Water, Light & Power Company, prays that the said decision and judgment of the Supreme Court of the State of Wisconsin, be reversed, and a judgment rendered in favor of the plaintiff in error and for costs.

GRACE, FRIDLEY & CRAWFORD,
CHARLES R. FRIDLEY,
W. P. CRAWFORD,
Attorneys for Plaintiff in Error,
Superior Water, Light & Power Company.

Superior, Wisconsin.

HARRY L. BUTTER,
Of Counsel.

Madison, Wisconsin.

9–72 [Endorsed:] Supreme Court of Wisconsin. Superior Water, Light & Power Company, Plaintiff in Error, vs. City of Superior, et al., Defendants in Error. Assignment of Errors. Original. Filed May 18, 1922. Arthur A. McLeod, Clerk of Supreme Court, Wis.

73 STATE OF WISCONSIN:

In Circuit Court, Douglas County.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'HARE and Fred C. Tomlinson, as Councilmen of said City of Superior, Defendants.

Now comes the plaintiff above named and for its amended and supplemental complaint in the above entitled action respectfully shows to the court and alleges:

I.

That the plaintiff is a corporation organized and existing under the laws of the State of Wisconsin.

II.

That the City of Superior is a municipal corporation duly organized under the laws of the State of Wisconsin and having the commission form of government, and that the municipal government of said city is vested in a council consisting of a mayor and two councilmen; that the defendant, F. A. Baxter, is the mayor, and that the defendants, C. N. O'Hare and Fred C. Tomlinson, are the councilmen of said city, and together constitute and are the council thereof.

III.

That the Superior Water Works Company is a corporation incorporated by and existing under the provisions of Chapter 359 of the private and local laws of Wisconsin for the year 1866.

That section 1 of said chapter 359 is as follows:

"Section 1. James Edwards, William R. Bowes, Michael S. Bright, Henry T. Holcomb and James Newton, and such other persons as shall associate with them for that purpose, according to the mode hereinafter prescribed, and their successors, are hereby made and constituted a body corporate and politic, by the name and style of the Superior water-works company, with perpetual succession; and by that name shall be capable at law of taking, purchasing, leasing and conveying estates and property, whether real, personal or mixed, so far as the same may be necessary for the purposes hereinafter mentioned, and no further; and in their corporate name may sue
74 and be sued, plead and be impleaded, answer and be answered, in any of the courts of this state, and in case of judgment against them, they shall pay full cost; may have a common seal, which they may alter or renew at pleasure; and may have and exercise all the powers, rights and privileges and immunities which are or may be necessary to carry into effect the purposes and objects of this act."

That section 8 of said chapter 359 is as follows:

"Section 8. For the purpose of supplying said town of Superior and its neighborhood with pure water, the said company may purchase, take and hold any real estate, and by their directors, agents, servants and other persons employed may enter upon the lands of any person or persons which may be necessary for said purpose, and may take the water from any ponds, springs, streams, wells, fountains, or lakes, and divert and convey the same to said town, and may raise or force the same into reservoirs, by means of steam or any mechanical power, and may lay, construct and repair any pipes, conduits, aqueducts, wells, reservoirs or other works of machinery necessary or proper for such purpose, upon any lands so entered upon, purchased, taken or held. Said company may as aforesaid enter upon any lands, streets, highways, roads, lanes or public squares through which they may deem it proper to carry the water so taken, and lay, con-

struct, repair and replace any pipes, conduits, hydrants, jets, fountains, aqueducts, wells, reservoirs or other works for that purpose, leaving the said lands, streets, highways, roads, lanes and public squares in the same condition, as nearly as may be, as they were before said entry."

That section 15 of said chapter 359 is as follows:

"The said company may make any agreements, contracts, grants and leases for the sale, use and distribution of water as may be agreed upon between said company and any person or persons, associations and corporations, and with the town of Superior, or neighboring towns; or the said company itself may take and use the surplus water for manufacturing or other purposes; which said agreements, contracts, grants and leases shall be valid and effectual in law."

IV.

That subsequent to the passage and publication of said Chapter 359, private and local laws of Wisconsin for the year 1866, and prior to October 15, 1887, the Village of Superior was duly incorporated under the laws of the State of Wisconsin out of territory included in the Town of Superior in Douglas County, Wisconsin, and on said October 15, 1887, was an incorporated village.

V.

That on October 15, 1887, said Village of Superior was desirous of procuring a supply of water for fire and other purposes, and that on said day the Village Board of said Village, for the purpose of providing for the protection of public and private property in said
75 village against fire, and of supplying the inhabitants thereof with water for domestic and public use, duly passed and adopted an ordinance known as Ordinance No. 1 of said Village of Superior, a true copy of which ordinance is hereto attached marked Exhibit "A" and made a part hereof.

That within thirty days thereafter said Superior Water Works Company duly filed with the Village Clerk of said Village of Superior its acceptance of the said ordinance and of the contract thereby created, and thereupon the president and village clerk of said village duly executed duplicate copies of said ordinance, with the seal of said village affixed, and delivered one of said copies to said Superior Water Works Company and accepted the other copy, executed as aforesaid, and also signed and sealed by said Superior Water Works Company, and caused such last named duplicate copy, properly acknowledged, to be recorded in the office of the Register of Deeds of Douglas County, Wisconsin, on the 6th day of March, 1888, in book A of Agreements on pages 158 to 171 inclusive; all as provided by section 18 of said Village Ordinance No. 1.

VI.

That said Superior Water Works Company thereupon and within one year thereafter constructed a system of water works as provided in and by said ordinance and completed the same within one year from the date of its acceptance of said ordinance, all as provided in said ordinance, and has fully performed all of the agreements and obligations on its part to be performed under the terms of said ordinance, and in so doing expended a large sum of money, to-wit: the sum of two hundred thousand ($200,000.00) dollars and upwards.

VII.

That thereafter the said Ordinance No. 1 was amended by village ordinance No. 5, a true copy of which said ordinance No. 5 is hereto attached marked Exhibit "B" and made a part hereof.

VIII.

That on March 25, 1889, the territory constituting the Village of Superior was incorporated as the City of Superior by chapter 152 of the laws of Wisconsin for the year 1889, and ever since
76 said time has been and now is such city. That by subsection 33 of section 35 of chapter 6 of the charter of said City of Superior, being said chapter 152 of the laws of Wisconsin for 1889, the said city was authorized to contract for the purchase of water works, and said subsection 33 was and is in words as follows, to-wit:

"Thirty-third. To make and establish public grounds, pumps, wells, cisterns and reservoirs, and to provide for the purchase, construction, maintenance and operation of water-works for the supply of water to the inhabitants of the city, and to supply such city with water for fire protection and other purposes; and to secure the erection of water works, said city may, by contract or ordinance, grant to any person, persons, company or corporation, the full right and privilege to build and own such water works, and to maintain, operate and regulate the same; and in doing so, to use the streets, alleys and bridges of the city in laying and maintaining the necessary pipe lines and hydrants for such term of years and on such conditions as may be prescribed by such ordinance or contract; and may also, by contract or ordinance, provide for supplying from such water works, the city with water for fire protection and for other purposes, and also the inhabitants thereof with water for such term of years, for such price, in such manner, and subject to such limitations as may be fixed by said contract or ordinance."

That subsection 34 of section 35 of chapter 6 of said charter of the City of Superior is as follows:

"Thirty-fourth. To provide for lighting the streets, public grounds and buildings with gas or otherwise; and for such purpose to con-

tract, by ordinance or otherwise, with any person, persons, company or corporation, for a term not exceeding ten years at any one time, at such price, on such terms, and subject to such limitations as may be prescribed by such ordinance or contract."

IX.

That in the year 1889 the City of Superior was desirous of procuring its supply of water for the use of its inhabitants from Lake Superior and found itself unable to procure the necessary right of way across the Bay of Superior and across Minnesota Point as provided in section 2 of said village ordinance No. 1, and thereupon, for the purpose of procuring such supply of Lake Superior water, and to relieve itself from its obligation to procure said right of way for such purpose as aforesaid, the city, through its common council, made and entered into a contract with said Superior Water Works Company, the terms of which were embodied in an ordinance known as ordinance No. 36, which said ordinance was duly passed and adopted by the common council of said City of Superior on the 1st day of October, 1889, and a true copy of which said ordi-
77 nance No. 36 is hereto attached marked Exhibit "C" and made a part hereof. That thereafter and prior to November 1, 1889, said Superior Water Works Company duly filed with the City Clerk of said City of Superior its written acceptance of the said ordinance and contract aforesaid.

X.

That on November 1, 1889, said Superior Water Works Company sold, assigned, transferred and conveyed to the above named plaintiff, Superior Water, Light and Power Company, by an instrument in writing, a true copy of which is hereto attached marked Exhibit "D" and made a part hereof, said water works system and all its property, real and personal, and all its rights under said village ordinance No. 1 as amended by said village ordinance No. 5 and by said city ordinance No. 36, and that the plaintiff thereupon succeeded to all the rights of said Superior Water Works Company under said ordinance No. 1 and said amendments thereto and assumed all the obligations thereunder of the said Superior Water Works Company, and thereupon, relying upon said ordinance No. 1 and the amendments aforesaid thereto as constituting a lawful and valid contract and especially relying upon the obligations assumed by said city under the provisions of said ordinance No. 36, said Superior Water, Light and Power Company fully performed on its part all of the agreements to be performed by said Superior Water Works Company under the provisions of said city ordinance No. 36 and obtained at its own expense an adequate supply of good and wholesome water for domestic and public purposes from said Lake Superior within the time and in all respects in the manner provided by said ordinance No. 36, and in so doing expended a large amount

of money, to-wit: in excess of $140,000.00, and ever since has furnished and now is furnishing the said water from Lake Superior to the inhabitants of said city and to said city. That for the purpose of procuring such supply of Lake Superior water it was necessary to acquire and this plaintiff did acquire a large tract of land on Minnesota Point in the State of Minnesota and extended its main across the Bay of Superior from the State of Wisconsin into the State of Minnesota and across said Minnesota Point in
78 the State of Minnesota, and constructed and installed an intake pipe extending a long distance out into Lake Superior and constructed and installed upon Minnesota Point in the State of Minnesota a system of wells and other machinery and equipment, all of which were and are necessary in order to procure water from Lake Superior as aforesaid, and that said tract of land on Minnesota Point and said wells, machinery, equipment, water mains and intake pipe, located in the State of Minnesota as aforesaid, constitute, and for upwards of twenty-seven years have constituted, the sole source of supply of such water from Lake Superior, and an essential part of the water-works plant and property of plaintiff necessarily required for the production, transmission, delivery and furnishing of water to the City of Superior and to the inhabitants thereof, and that without such property so located in the State of Minnesota it would not for many years last past have been possible and is not now possible, to supply or furnish good or wholesome water to the city or its inhabitants,—all of which facts are, and for a great many years last past have been, well and commonly known to the city and to the inhabitants thereof, and were matters of common knowledge to the electors of the city at the time of the adoption of the resolution, Exhibit "H," hereto attached, and at the time of the election, hereinafter referred to, held pursuant to such resolution.

XI.

That thereafter ordinances known as Nos. 38, 311 and 374 amending said ordinance No. 1 were duly passed and adopted by the Common Council of said City of Superior, copies of which said ordinances are hereto attached marked Exhibit "E," "F," and "G," respectively, and made a part hereof; that said ordinances No. 311 and 374 were duly accepted by this plaintiff in the manner and within the time therein provided, and that said ordinance No. 1 of the Village of Superior as amended by said village ordinance No. 5 and by said city ordinances 36, 38, 311 and 374 has continued to be and now is in full force and effect.

XII.

That the franchise granted by said village ordinance No.
79 1 as amended never has been surrendered by the plaintiff either under the provisions of chapter 499, laws of Wisconsin for the year 1907, or otherwise, and that the plaintiff has fully performed all of the agreements and obligations on its part to be per-

formed under the said village ordinance No. 1 as amended and the contract thereby made between the plaintiff and the said City of Superior; that in performance of said agreements and obligations and relying on said contract and the agreement on the part of said City of Superior to purchase plaintiff's water works system, plaintiff has expended large sums of money in extensions and improvements of its water works system, and that the money so expended up to July 1, 1911, and not including the said sum of two hundred thousand ($200,000.00) dollars aforesaid, expended by the said Superior Water Works Company, amounts to the sum of eight hundred sixty thousand ($860,000.00) dollars and upwards; and that since said July 1, 1911, relying upon said contract and agreement aforesaid, this plaintiff has expended from time to time further large sums of money in extensions and improvements of its said water works system and its water mains;

That from time to time the City of Superior, by resolution of its Common Council, has required this plaintiff to extend its water mains beyond the five miles provided for in said ordinance No. 1, and pursuant to such order and resolutions this plaintiff has extended and provided water mains in the City of Superior to the amount of seventy-six (76) miles and in so doing has necessarily incurred great expense and an expenditure of more than five hundred thousand ($500,000.00) dollars.

XIII.

That on October 15, 1917, the said franchise, granted as aforesaid, expired by its own limitation, and thereupon it became and was the duty of the City of Superior to purchase the said Water Works system and the property connected therewith from this plaintiff pursuant to the provisions of said village ordinance No. 1 as amended and upon the terms and for the price therein provided unless the said City of Superior should elect to grant to the said plaintiff the right to continue and maintain said system of water works for another term of thirty years upon the same terms and conditions as existed on said October 15, 1917, between the said City of
80 Superior and the plaintiff, in and upon the public grounds and streets of the said city, and to supply the said city and its inhabitants thereof with water on reasonable terms.

XIV.

That thereupon this plaintiff requested the Mayor and Council of said City of Superior to determine whether said city would purchase said water works system or would exercise its election to renew said franchise; that said Mayor and Council submitted to the Legal Department of said City of Superior the question as to the rights and obligations of said city under said ordinance No. 1 as amended; that said Legal Department, on or about October 5, 1918, filed its written legal opinion in answer to said question and submitted the same to the said mayor and council, and that the said mayor and

council then and thereupon wholly repudiated the obligation of said city to purchase said water works system under the provisions of said ordinance No. 1 as amended, and denied the existence and validity of the contract on the part of the city to purchase as aforesaid, and began proceeding under the provisions of 1797*m*-1 to 1797*m*-109 of the Wisconsin Statutes to acquire the said water works system together with other property of this plaintiff, and for such purpose said mayor and council, on October 8, 1918, passed and adopted a resolution, of which a true copy is hereto attached and marked Exhibit "H" and made a part hereof.

XV.

That thereupon the City Clerk of said City of Superior published and gave notice of an election to be held for the purpose of voting upon the question of acquiring the said water works system and property, a true copy of which notice is hereto attached marked Exhibit "I" and made a part hereof.

That said election was held and a majority of the votes cast upon the question thereat were in favor of acquiring said plants under the provisions of said sections 1797*m*-1 to 1797*m*-109.

XVI.

That, as more fully appears from said resolution, Exhibit "H," and from said notice of election, Exhibit "I," the only question determined by the Council of the City of Superior or sub-
81 mitted to or voted upon by the electors of said city, was the question whether said city should acquire all the water, gas and electric properties of the company, within and without the city, including that part of the water works property of the company situate in the State of Minnesota as aforesaid, and that it was intended and determined to acquire all of said properties rather than a part of them.

That as plaintiff is advised and alleges the fact to be, the laws of the State of Minnesota do not confer the power of eminent domain upon the said City of Superior, and do not authorize or permit said city to acquire property by condemnation. That because of such want of power and the facts aforesaid, the said resolution and the proceedings thereunder, including the said election were and are wholly void.

XVII.

That said resolution so passed by the Mayor and Common Council on the 8th day of October, 1918, and the said acts and proceedings of defendant thereafter taken to acquire the property of plaintiff, as hereinbefore set forth, purport to be made, taken and to be had under and pursuant to the provisions of sections 1797*m*-1 to 1797*m*-109, inclusive, of the statutes of the State of Wisconsin.

That said resolution and any law authorizing the same and said statutes, sections 1797*m*-1 to 1797*m*-109, in so far as said statutes or

any of them, purports to modify, amend or affect the said franchise owned by this plaintiff or the contract of purchase therein embodied, is a law impairing the obligation of contracts and is an act of the State of Wisconsin depriving the defendant of property without due process of law, and is a denial to said defendant of the equal protection of the law, and is also in violation of justice and in violation of fundamental principles, and is in violation of the Constitution of the United States and the Constitution of the State of Wisconsin, and particularly is in violation of section 10 of Article 1 of the Constitution of the United States, and section 1 of Article 14 of Amendments to the Constitution of the United States, and is in violation of Sections 12, 13, 22 of Article 1 of the Constitution of the State of Wisconsin.

XVIII.

That notwithstanding said contract between said City and this plaintiff and obligation thereunder of the City to purchase
82 said water works system from this plaintiff as therein provided, and notwithstanding the proceedings aforesaid are brought to acquire and the voters at said election voted to acquire all the property of this plaintiff including all of its water works system and including that part of said water works system situate in the State of Minnesota, the said City and the defendants, F. A. Baxter as Mayor, and C. N. O'Hare and F. C. Tomlinson as Councilmen of said city, threaten to, and unless restrained by the order and judgment of this court will proceed under the provisions of said statutes, sections 1797*m*-1 to 1797*m*-109, and will procure a hearing to be had before the Wisconsin Railroad Commission and the property aforesaid of this plaintiff to be valued by said Commission, and will attempt to acquire plaintiff's said property under said statutes, and that said acts and proceedings of the said defendants will cause irreparable damage to the plaintiff and to its properties aforesaid; that the plaintiff will be put to great expense, its credit will be greatly impaired, and it will be unable to finance the extensions of its water mains and its water works system rendered necessary by the development of the city; that its title to its said properties will be clouded and that its business and revenues will be injuriously affected all by reason of the said acts and proceedings of the said defendants as aforesaid.

Wherefore plaintiff demands judgment that the defendant, City of Superior be required to specifically perform its said agreement to purchase said property from the plaintiff under the provisions of said ordinance No. 1 as amended, and that the price to be paid therefor by said defendant be ascertained in the manner provided in said ordinance as amended; that said resolution passed and adopted by the mayor and council of said City of Superior on October 8, 1918, and the said election on the question of acquiring plaintiff's said property be declared void, and that during the pendency of this action the defendants City of Superior and F. A. Baxter, C. N. O'Hare and Fred

C. Tomlinson as mayor and council of said City of Superior and their successors in office, be restrained and enjoined from pro-
83 ceeding further under the provisions of said sections 1797*m*-1 to 1797*m*-109 of the Wisconsin statutes in the attempt to acquire plaintiff's said properties and from taking any steps or doing any acts to acquire said properties except under and pursuant to the provisions of said ordinance No. 1 as amended, and for such other or further order, judgment or relief as may be proper or equitable, together with costs and disbursements.

GRACE & FRIDLEY,
Attorneys for Plaintiff.

W. R. FOLEY,
Of Counsel.

STATE OF WISCONSIN,
Douglas County, ss:

W. H. Winslow being first duly sworn on oath says that he is an officer, to-wit: Vice-President of the above named plaintiff, Superior Water, Light and Power Company, a corporation, and makes this verification for and on behalf of said plaintiff and is authorized so to do; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true to his own knowledge except as to matters therein stated upon information and belief, and as to such matters he believes the same to be true. That the reason this verification is not made by the party is that said party is a corporation and affiant is such officer thereof as aforesaid and has personal knowledge of the facts.

W. H. WINSLOW.

Subscribed and sworn to before me this 27th day of January, 1919.
C. R. FRIDLEY,
Notary Public, Douglas County, Wisconsin.

84 [Endorsed:] Copy. No. —. State of Wisconsin, Douglas County, Circuit Court. Superior Water, Light & Power Company, Plaintiff, vs. City of Superior et al., Defendants. Amended Complaint. Grace, Hudnall & Fridley, Attorneys for —— ——, National Bank Bldg., Superior, Wis.

85 EXHIBIT "A."

Ordinance No. 1.

An ordinance authorizing the Superior Water Works Company, its successor or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of the said village and the inhabitants thereof, and defining their rights, privileges and powers.

The Village Board of the village of Superior do ordain as follows, to-wit:

Section 1. For the purpose of providing for the protection of public and private property in the village of Superior, against fire, and for the extinguishment of fires and for the purpose of supplying the inhabitants thereof with pure and wholesome water, suitable for domestic and public use and in consideration of the benefits to accrue to the village of Superior by establishing and maintaining a good, substantial and complete system of water works and fire protection, there is hereby granted, subject to the right of purchase and the forfeiture hereinafter provided and (reservation of Water Works on Connor's Point hereinafter provided) to the Superior Water Works Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin and to its successors and assigns the privilege of establishing, maintaining and operating a system of water works and the construction of such pipe lines, standpipe, open or closed, reservoirs and conduits as may be necessary and sufficient in size and also the laying of water mains and pipes and the placing of fire hydrants in and along the streets, avenues, alleys and public grounds of said village of Superior, Douglas County, Wisconsin, as the same now exists or may hereafter be extended for the supply of water suitable for domestic and other purposes, for the term of thirty years from and after the passage of this ordinance. The said village of Superior shall and will abstain for the period of the said thirty years from and after the passage of this ordinance, from granting to any party or parties, other than the said Superior Water Works Company, its successors or assigns, the rights or privilege to lay water mains or pipes in any of the streets, avenues, alleys, public grounds or sidewalks of said village or to furnish water to said village or its inhabitants, or any portion thereof and the said village shall and will likewise abstain from so laying water mains or pipes or so furnishing water for and on its own behalf, provided, however, that at the expiration of the said thirty years, should the said village refuse to grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of water works for another term of thirty years, upon the said terms and conditions as may exist between the said village or city and the said
86 Superior Water Works Company, at the expiration of the 1st thirty years, in and upon the public grounds and streets of the said village and to supply the said village and the inhabitants thereof with water on reasonable terms, then and in such case, the village shall purchase from said Superior Water Works Company, its successors or assigns, said system of water works and the property connected therewith, at a fair valuation as provided for in section 13. (It being understood that the territory now actually occupied and supplied with water by the system of water works in operation on Connor's Point is expressly excepted and reserved from this grant, but said works are not to be extended beyond the present occupied limits.) Nothing herein contained shall be construed as preventing the village from maintaining the present public wells within its ter-

ritory, or from digging, constructing or maintaining additional wells, provided the water from said wells is not conducted in pipes and mains and sold to consumers.

Section II. The main source from which the water to be supplied by said Superior Water Works Company to be obtained shall be the Bay of Superior. The water supplied shall before its delivery for general use be first filtered through a sand filled crib located in said Superior Bay and then by an additional process of mechanical filtration, either by the "Hyatt System" or some other system of filtration giving equally pure water. It being agreed that the water so filtered is to be pure and wholesome and suitable for both public and domestic use. Nothing in the above is to be construed as making it obligatory that the water when used for fire extinguishing must be so filtered, but it is understood that if unfiltered water is used for any purpose that the pipes and conduits and water mains shall be thoroughly cleansed of all dirt, sand and impurities before filtered
87 water shall be supplied through the same: (Provided, however, that if the said village of Superior shall procure for the said Superior Water Works Company without cost or expense to said company the valid and indefeasible right to extend and lay its pipes across the said Bay of Superior and across Minnesota Point to the shores of and into Lake Superior on and along the shortest line from the location of its pumping station to the shores of said Lake. It being understood that a strip of land thirty feet in width across Minnesota Point shall be a sufficient right of way across the same to comply with the terms of that part of the right of way to be secured. The said Superior Water Works Company shall within one year after receiving notice from said village that the said right of way has been so acquired, extend its pipes into Lake Superior and take therefrom the supply of water for said village, but in case the right of way so procured shall not be on or along the said shortest line above described or approximating thereto, the said Superior Water Works Company shall not be required to make the extension required until it shall be paid by said village a sum equal to the additional expense which will be incurred by reason of such divergence. It being agreed, however, that upon a written request for a designation of said shortest line within the term of this agreement, by the village President, filed with the secretary of said company, or the agent in charge of said company's works. The said company shall within thirty days thereafter file with the village clerk a statement designating the particular lots, blocks or pieces of land, across which the said right of way would pass by the said shortest line and it is further agreed that if the said company shall fail or refuse to make the extension into Lake Superior, as above provided, the said Company shall from that date forfeit all rental for hydrants to be paid for by the village
88 until such extension is completed.) Provided, however, that nothing in this section shall be construed as preventing the said Superior Water Works Company of its own volition from obtaining the supply of water from said Lake Superior at any point or in

any manner by which an adequate supply of water may be obtained from said Lake.

Section III. The general plan of construction and operation of the system of water works hereby authorized shall be as follows: There shall be improved powerful pumping machinery of a modern and appropriate type, having an aggregate pumping capacity of at least one and one-half million gallons in each twenty-four hours. The pump house shall be of brick or stone and of sufficient size to accommodate the machinery of said water works and with a slate or iron covered roof and located on a strip of land extending into the Bay of Superior from some point on said Bay, east of Connor's Point. The water shall be conducted through pipes of such size as to give a practical working head or pressure sufficient for fire protection and domestic and manufacturing uses and laid in and along such streets or avenues as may be deemed necessary or desirable by the said village for fire protection and domestic supply and the said company shall in the first instance lay not less than five miles of water mains. All of the machinery shall be increased from time to time as the growth of the village may require. The distributing system of mains shall be divided into districts by a proper arrangement of gates and valves to facilitate the making of extensions and repairs without undue interruption to the supply of water. The power and capacity of said works shall be such that upon their completion they will stand the test of said works hereinafter provided for. The said company, their successors and assigns, shall
89 test the power and capacity upon their completion, under the supervision of said village. When they shall throw water from six separate hydrants at one and the same time one hundred feet high, through one hundred feet of two and one-half (2½) inch hose and a one inch nozzle, and when on another test they shall throw water from four separate hydrants one hundred feet high through one hundred and fifty feet of two and one-half (2½) inch hose and a one inch nozzle, upon which test having been made as aforesaid, the village of Superior agrees to accept said works forthwith and from the date of the completion of the said test the hydrant rentals hereinafter stipulated shall begin.

Section IV. If at any time it shall appear that the said Superior Water Works Company by extending its mains beyond the five (5) miles constructed in the first instance will receive an additional average revenue of not less than one hundred ($100) dollars per annum from the sale of water from every three hundred (300) feet of such extension so ordered from responsible private consumers secured by written agreement and from the rental of public fire hydrants upon the terms hereinafter stated, then the village may by resolution require the said company to make such extension without unreasonable delay, provided, however, that if said company shall be required under this section to lay their mains in streets where grade has not been established that whenever said grade is established the village of Superior shall pay the cost of relaying such

mains with proper reference to the established grade, provided said mains by the establishing of said grade are too near the surface of the street to be protected from frost. That during the progress of the work, said company shall not unnecessarily obstruct any
90 street, alley or public ground and in laying their pipes and conduits they shall properly repair and make good any gas or sewer pipes previously laid that shall be disturbed by them and shall complete each part of the work commenced therein as speedily as practicable and restore the said streets, alleys, avenues and public grounds, sidewalks and crossings to as good condition as near as practicable as they were before said work was commenced and that in removing pavements and sidewalks and making necessary excavations for constructing said water works or for repair, they shall suitably guard and protect the same so as to prevent injury to persons and property by reason thereof and the said company shall be liable for all damages by failure to so guard and protect persons and property from injury by removal of such sidewalks or pavements or the making of such excavations and repairs as aforesaid when occasioned by the negligence of said company or their agents or employees and shall hold the village harmless therefrom and pay any sum or sums that may be recovered against the village arising from such negligence in case defense is duly tendered by said village to them.

Section V. Said Superior Water Works Company shall erect and maintain not less than sixteen (16) fire hydrants for the use of said village of Superior for each and every mile of water mains laid by said company whether in the first instance or when extending its mains in the manner stated in the preceding action, the said fire hydrants to be of improved construction, with frost cases and two two and one-half inch delivery nozzles each. Such hydrants shall be placed at such points along the line of said pipes as may be designated by said village, if such designation be made within thirty (30) days after the acceptance of this ordinance or after the pas-
91 sage of a resolution directing an extension. In case the said village fail to designate the location of said hydrants within such time, then the said company shall locate said hydrants. Should the said company permit any of the fire hydrants furnished by it for the use of said village to remain out of repair and inoperative for a period exceeding one week, after being notified in writing by the chief of the fire department or other authorized official, that said hydrant is out of repair, then there shall be deducted from the hydrant rental the sum of ten (10) dollars per week for each and every week during which said hydrant shall remain inoperative, provided, however, that the total amount so deducted shall not exceed double the annual rental of such defective hydrant. The public fire hydrants rented by said village are not for the private use of the citizens or for street sprinkling purposes except as hereinafter provided, but shall be used only for fire protection purposes, fire company practice and for flushing gutters and sewers through hose and a fire nozzle, and when used for the latter purpose only one opening

of one hydrant shall be used at one time and not to exceed thirty minutes in each week per hydrant, and in no case shall any fire hydrant be so used during the existence of a fire or without due notice to the superintendent of said company. The said company will, whenever required by said village, remove any of said fire hydrants and relocate them at any other point on its line of mains, upon the cost of such removal being paid to the said Superior Water Works Company by said village. The fire nozzles on all fire hydrants shall be of the same pattern and size as those now in use on fire hose by the city of Duluth.

92 Section VI. In further consideration of the benefits that will accrue to the Village of Superior and its inhabitants from the erection and operation of water works and for the better protection of said village from fire, the said village of Superior hereby agrees and binds itself to rent and does hereby rent from said Superior Water Works Company the public fire hydrants of the class, character and numbers hereinbefore described and provided for, to be located on the said lines of water mains which are to be constructed in the first instance or extended as hereinbefore provided, for and during the term of this franchise, hereby granted from and after the construction and completion of said hydrants and acceptance of the works as above provided.

The said village agrees to use said hydrants carefully and to pay said company for any injury which may result from misuse or abuse by the agents or employees of said village and the said village shall enforce such ordinances as may be necessary to protect said company in the said property and rights within the village from the acts of evil disposed persons during the continuance of this franchise. The rental to be paid for the use of said hydrants shall be seventy-five (75) dollars each per annum for the first eighty (80) hydrants which shall be located and constructed as hereinbefore provided, sixty (60) dollars each per annum for the second eighty (80) of said hydrants and fifty (50) dollars each per annum for all hydrants additional to the said first and second eighty (80) hydrants, provided, however, that whenever the population of the village or city of Superior shall be fifteen thousand or more, the rental of all said hydrants shall be (fifty) dollars per hydrant the said rental to be paid to the said Superior Water Works Company or its order, and the payment thereof shall be made quarterly yearly pro rata, viz: on the
93 first days of January, April, July and October of each and every year during the term of this contract or until said works are purchased by said village as hereinafter provided.

Section VII. The said Superior Water Works Company shall furnish water free for five (5) public drinking fountains for man and beast and for three (3) public fountains, each fountain to have not to exceed six jets, each of which jets shall not exceed in (one) volume one orifice of one sixteenth of an inch, from the first of May to the first of November in each year for and during the term of this franchise, and shall also furnish water for washing hose in village fire engine and hose in houses and for use in all buildings belonging

to the village when used for village offices and public schools and also for sprinkling streets and public grounds and parks, when done by and for the village at their expense. All drinking fountains, plumbing work and so forth in connection with the above shall be self-closing work and so arranged as to prevent taking water off the premises or for any other purpose except as above specified and shall be put in and kept in repair by and at the cost of said village of Superior.

Section VIII. In the event that said Superior Water Works Company, after said water works shall have been in successful operation, suffer a suspension of a supply of good and wholesome water, thereby causing an insufficiency for domestic and other purposes, and for a period exceeding sixty days, then in that event, said company shall forfeit all exclusive franchises herein granted pertaining to it as a Water Company unless such suspension shall have been caused by the act of God, the interference of courts, by public enemies
94 or unavoidable accident, or other causes over which the company has no control, and during any such failure of supply all water rentals shall be suspended.

Section IX. The said Superior Water Works Company shall have the right to shut off the water supply temporarily from its main pipes or any portion thereof, for the purpose of making repairs or extensions to its works and said Company shall not be liable for the village or to any consumer for damages occasioned by such temporary suspension of the supply of water and the said repairs or extensions are to be made with due diligence by the company.

Section X. The village of Superior shall upon written application of said Superior Water Works Company condemn the right of way for said company to construct their works and lay water pipes over and upon any tract of land, which condemnation shall be at the cost of said Water Company and all rights so acquired shall accrue to said Water Company and for its use and benefit.

Section XI. The village shall adopt and enforce ordinances protecting the said Superior Water Works Company in the safe and unmolested exercise of its franchises and against fraud and imposition and against injury to its property and waste of water by consumers and the said Superior Water Works Company may make and enforce as part of the conditions upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with law.

Section XII. It is further provided and ordained that the said Superior Water Works Company and its successors or assigns,
95 for and during the term and continuance of the franchise granted by this ordinance may charge and collect as their annual rate for water furnished consumers a tariff not exceeding the following scheduled rates, but it shall have the right at its option at

any time to insert a meter into the service pipe of any consumer and to supply to such consumer at meter rates.

* * * * * * *

Section XIII. (This ordinance is passed upon the express condition and reservation that the village of Superior reserves to itself the right to acquire of said Company, their successors and as-
96 signs, the said water works and all lands, machinery, pipes, mains, hydrants and appurtenances thereunto belonging, and the said company, their successors and assigns, in accepting this ordinance expressly covenants and agrees that it will sell and convey to the village of Superior the said water works and all lands, machinery, pipes, mains, hydrants and appurtenances thereunto belonging and release to said village all its water works franchises at the expiration of ten years from the passage of this ordinance and at intervals of five years thereafter.

Whenever the village shall determine or desire to purchase said works, the President thereof shall at the expiration of either of the above mentioned dates or within a reasonable time thereafter give one year's written notice to said company, their successors or assigns of the intention of the village to purchase and demand of said company, their successors or assigns, to appoint and select one person to act as an arbitrator, in the fixing and appraising the value of such water works. Which said notice may be served upon the secretary of said company or upon the chief officer in charge of the water works at Superior.

Before the expiration of one year from the date of service of the said notice the said company, its successors and assigns, and the said village shall each select one person to act as appraisers, but in case of failure of said village to appoint an appraiser, such arbitration shall be thereby ended and the two appraisers thus chosen shall within ten days after the expiration of said year select a third appraiser and the three persons thus selected shall within thirty days thereafter determine the value of the said water works as hereinafter mentioned. And in case said company, their successors and
97 assigns, shall fail or neglect to select such arbitrator within the time hereinbefore required, or in case the two arbitrators should neglect or refuse to choose a third arbitrator within the time hereinbefore required; then, in either or both cases, as may be, the one arbitrator or the third arbitrator may be appointed by the Judge of the Circuit Court of the Judicial District in which said village shall be situated, on the application by the President of the village on ten days' notice in writing to the said Company, its successors or assigns or to the chief officer in charge of said water works.

The persons selected as arbitrator shall not be residents of the village of Superior or persons in the employ or interest of the said village or of the said company, its successors and assigns.

Said three persons or their majority at a meeting of which all said arbitrators shall have had personal notice, may and shall as arbitrators on examination and evidence—and the said village and the said company shall each at their option have the right to call

non-resident experts not exceeding three in behalf of each party, to give testimony under oath before said three appraisers as to the value of said water works—fix and determine the actual value of the said water works exclusive of the rights and privileges hereinbefore granted by the said village to the said company, their successors or assigns, and without reference to any franchise therewith connected, but including all lands, improvements, buildings, betterments, machinery or other appliances constituting said water works.

Such appraisal not to exceed what it would cost to build
98 and construct such works at the time of such appraisal; when the said award or appraisement has been so made the said appraisers shall notify said village and said company of the value determined upon and the said village shall have the option of refusing to purchase or of paying the said company the amount thereof in cash within six (6) months after the date of said notice of award and upon such payment in full, the said village shall enter into the possession of said water works, rights and property. But until such payment in full the possession, enjoyment and revenues of said water works, rights and property shall belong to the said company. If the said village shall refuse to purchase or to pay the amount of the purchase price in full before the expiration of the said six months, then said village shall pay all the expenses of such appraisement, but if the village purchase each of the parties are to pay one-half of the expense. The said village shall in the event of such purchase perform all unfinished contracts made by said company for furnishing water and shall assume and pay all debts and obligations of said company not exceeding the amount of said purchase money to be paid by said village and all sums so paid shall be in part discharge of said purchase money.)

Section XIV. Within thirty days after the passage of this ordinance said Superior Water Works Company may file with the village clerk its acceptance thereof, duly acknowledged before some authorized officer and from and after the filing of said acceptance this ordinance shall have the effect of and be a contract between the village of Superior and the Superior Water Works Company and shall be the measure of the rights and liabilities of said village as well as of said company, and in case such acceptance is not so made and filed within thirty days after the passage of this or-
99 dinance, the village board shall have the right to repeal the same.

Said company shall within thirty days from the date of such acceptance commence the construction of this system of water works and shall have the same with the five miles of water mains which are to be laid in the first instance completed and in full operation within one year from the date of such acceptance. Provided, however, that said company shall within ninety days after such acceptance for the temporary protection of said village of Superior from fire, lay a water main on Tower Avenue between Winter and Third Streets and shall be allowed to take the water supply for such main from a point on Tower Slip until such — in full operation.

Section XV. Should said village of Superior at any time be incorporated as a city, the term "Village" shall be construed in this ordinance to mean "City" and the term "Village Board" to mean the "Common Council" of said city and the word "President" to mean "Mayor" and the provisions of this ordinance shall apply to the successors and assigns of said company.

Section XVI. The president and village clerk of the said village of Superior are hereby authorized and instructed upon the said acceptance of this ordinance to execute duplicate copies with the seal of the village of Superior affixed and shall deliver one of the said copies so signed and sealed, in behalf of the village of said Superior Water Works Company and to accept the other, when signed and sealed by them in behalf of said village and to cause it to be properly acknowledged and recorded in the office of the Register of Deeds of Douglas County, Wisconsin.

Section XVII. This ordinance shall take effect and be in force from and after its passage and publication.

Dated October 15th, 1887.

L. F. JOHNSON.

Attest:
W. R. FANNING,
Village Clerk.

EXHIBIT "B."

Ordinance No. 5.

An ordinance amending and re-enacting section 13 of an ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof and defining their rights, privileges and powers. Passed October 15th, 1887.

The Village Board of the village of Superior do ordain as follows to-wit:

Section 1. That section 13 of an ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof and defining their rights, privileges and powers, be amended and re-enacted so as to read as follows:

Section 13. This ordinance is passed upon the express condition and reservation that the village of Superior reserves to itself the right to acquire of said company their successors and assigns, the

said water works, and all lands, machinery, pipes, mains, hydrants and appurtenances thereunto belonging and the said company, their successors and assigns, in accepting this ordinance, expressly covenants and agrees that it will sell and convey to the village of Superior the said water works and all lands, machinery, pipes, mains, hydrants and appurtenances thereunto belonging and release to said village all its water works franchises at the expiration of ten years from the passage of the ordinance and at intervals of five years thereafter. Whenever the village shall determine or desire to purchase said works the president thereof shall, at the expiration of either of the above mentioned dates, or within a reasonable time thereafter, give one year's written notice to said company, their successors or assigns, of the intentions of the village to purchase and demand of said company, their successors or assigns, to appoint and select one person to act as an arbitrator in the fixing and appraising the value of such water works, which said notice may be served upon the secretary of said company or upon the chief officer in charge of the water works at Superior, before the expiration of one year from date of service of said notice, the said company, its successors and assigns, and the said village shall each select one person to act as appraisers, but in case of failure of said village to appoint an appraiser, such arbitration shall be thereby ended and the two appraisers thus chosen shall within ten days after the expiration of said year, select
102 a third appraiser and the three persons thus selected shall within thirty days thereafter determine the value of the said water works as hereinafter mentioned. And in case said company, their successors and assigns, shall fail or neglect to select such arbitrator within the time hereinbefore required, or in case the two arbitrators should neglect or refuse to choose, a third arbitrator may be appointed by the Judge of the Circuit Court of the Judicial District in which said village shall be situated, on the application by the president of the village on ten days' notice in writing to the said company, its successors or assigns, or to the chief officer in charge of said water works. The persons selected as arbitrators shall not be residents of the village of Superior, or persons in the employ or interest of the said village or of the said company, its successors and assigns. Said three persons or their majority at a meeting of which all said arbitrators shall have had personal notice, may and shall act as arbitrators, on examination and evidence—and the said village and the said company shall each at their option have the right to call non-resident experts, not exceeding three, in behalf of each party, to give testimony under oath before said three appraisers as to the value of said Water Works fix and determine the actual value of said water works, exclusive of the rights and privileges hereinbefore granted by the said village to the said company, their successors or assigns and without reference to any franchise therewith connected, but including all lands, improvements, buildings, betterments, machinery or other appliances, constituting said water works. When the said award or appraisement has been so made, the said appraisers shall notify said village and said company of the value

determined upon and the said village shall have the option of refusing to purchase or of paying the said company the amount
103 thereof in cash within six (6) months after the date of said notice of ward, and upon such payment in full the said village shall enter into the possession of said water works, rights and property, but until such payment in full, the possession, enjoyment and revenues of said water works, rights and property shall belong to said company. If the said village shall refuse to purchase or to pay the amount of the purchase price in full before the expiration of the said six months, then the said village shall pay all the expenses of such appraisement, but if the village purchase each of the parties are to pay one-half of the expense.

The said village shall, in the event of such purchase, perform all the unfinished contracts made by said company for furnishing water, and shall assume and pay all debts and obligations of said company, not exceeding the amount of said purchase money to be paid by said village, and all sums so paid shall be in part discharge of said purchase money.

(This ordinance shall take effect and be in force from and after its passage and publication.)

L. F. JOHNSTON.

EXHIBIT "C."

An Ordinance (No. 36) amending and re-enacting Ordinance No. 5 of the general ordinances of the village (now city) of Superior, entitled "an ordinance amending and re-enacting Section 13 of an ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a
104 system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers;" and also amending and re-acting section 2 of ordinance No. 1 of the general ordinances of the village (now city) of Superior, entitled "an ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers."

The common council of the city of Superior do ordain as follows:

Section I.

Ordinance number 5 of the general ordinances of the village now city) of Superior, entitled "an ordinance amending and reacting section 13 of an ordinance authorizing the Superior Water

Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers," is hereby amended by striking out of said ordinance all of said ordinance after the words "Section 13," where the said words "Section 13" occur, in the thirteenth line thereof and inserting in lieu thereof the following:

This ordinance is passed upon the express condition that at
105 the expiration of twenty years after the date of the passage of this ordinance and of every fifth year thereafter, the city of Superior may, at its option, purchase from the said Superior Water Works Company, its successors or assigns, the entire plant of the said Superior Water Works Company, its successors or assigns, and including all franchises theretofore granted to said Superior Water Works Company, its successors or assigns, by the village or city of Superior, by paying therefor, in cash, an amount of money, of which the net earnings of said Superior Water Works Company, for the year next preceding the purchase thereof, by said city, shall be five per centum. Such purchase shall be made in the following manner, to-wit: The common council at its first regular meeting after the expiration of said twenty years, or of any fifth year thereafter, may pass an ordinance declaring its intention to purchase said plant and franchises appropriating the necessary funds therefor and directing the city clerk of said city, to serve upon said Superior Water Works Company, its successors or assigns, a copy of said ordinance, together with a notice that at the expiration of one year from the date of the service of said notice, the said city will pay to said Superior Water Works Company, its successors, or assigns, the price of said plant and franchises, determined as by this ordinance provided, and will assume possession of said plant and franchises. Commencing with the day following the date of the service of such notice, the said Superior Water Works Company, its successors or assigns, shall keep an accurate account of all receipts and disbursements of said company, in a set of books kept expressly for that purpose and for no other, which said books shall at the expiration of each quarter year thereafter be open to the inspection of the city comptroller of said city. At the expiration of one year from
106 the date of the service of the notice above provided for, the said Superior Water Works Company, its successors or assigns, shall submit to the comptroller of said city, the said books of account, and the price to be paid for said plant and franchises shall be determined therefrom, as hereinbefore provided and upon the payment, in full, of said price, the said Superior Water Works Company, its successors or assigns, shall surrender to said city its said plant and franchises complete. The words "net earnings" as used in this ordinance, shall mean the gross earnings of said water works, less the actual operating expenses thereof.

Section II.

This ordinance is passed upon the consideration to the city of Superior that the said city is hereby released and relieved from the duty, cost and expense of procuring, for said Superior Water Works Company, the valid and indefeasable right to extend and lay its pipes across the bay of Superior and across Minnesota Point, to the shores of, and into Lake Superior, as provided in section 2 of said ordinance number one of the general ordinances of the village of Superior and that all that part of said section No. 2, commencing with the word "provided" in the twentieth line thereof, down to and including the word "completed" in the sixty-second line thereof, is hereby repealed. And this said ordinance is passed upon the further consideration to the city of Superior, that by the acceptance hereof the said Superior Water Works Company binds itself, its successors and assigns, to obtain at its own expense an adequate supply of good and wholesome water for domestic and public purposes from said Lake Superior and to furnish the same to the inhabitants of said city and to said city as provided in said ordinance number one as hereby amended within two years from the acceptance of this ordinance by said Superior Water Works Company.

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Section III.

This ordinance is passed with the consent of the Superior Water Works Company and upon filing a written acceptance by it with the city clerk of the said city of Superior the said ordinance with all other ordinances of said city or the village of Superior granting to the said Superior Water Works Company any rights or franchises shall be and become and is hereby made a binding contract as so amended and modified.

Section IV.

This ordinance shall take effect and be in force from and after the date of its passage.

Passed and approved Oct. 1, 1889.

A. J. McRAE,
Mayor.

Attest:
J. A. KELLEY,
City Clerk.

EXHIBIT "D."

This indenture made and entered into this first day of November 1889, by and between the Superior Water Works Company, a corporation duly created and existing under the laws of Wisconsin,

of the city of Superior, state of Wisconsin, party of the first
108 part, and the Superior Water, Light and Power Company, a corporation of the said state of Wisconsin, party of the second part.

Witnesseth that whereas the party of the first part was created a corporation by special act of the legislature of Wisconsin, approved April 16, 1866, and by which said act said corporation was given valuable rights and franchises, including the right of perpetual succession and the right to build, erect, maintain and operate water works in the city of Superior, Wisconsin, and purchase, take, hold and convey its real estate, and personal property of every kind and nature and enter upon the lands of any person or persons which may be necessary for any purpose and take water from any ponds, springs, streams, well, fountains or lakes and divert and convey the same to said town, and may raise and force the same into reservoirs by means of steam or any mechanical power, and may lay, construct and repair any pipes, conduits, aqueducts, wells, reservoirs or other works or machinery necessary or proper for such purposes upon any lands so entered upon, purchased, taken, or held, and said corporation was authorized to enter upon any lands, streets, highways, roads, lanes or public squares of said city through which it may deem it proper to carry the water so taken, and lay, construct, repair and replace any pipes, conduits, hydrants, jets, fountains, aqueducts, wells, reservoirs or other works for that purpose, and was granted power of eminent domain and other valuable rights and franchises therein enumerated; and whereas by an ordinance passed October 15th, 1887, by the village (now city) of Superior and amendments thereto, the said Superior Water Works Company was granted
certain valuable rights, franchises and immunities, to itself, its
109 successors and assigns, including the right to build, erect, maintain and operate a system of water works in the city of Superior, Wisconsin, and to construct and lay pipe lines, stand pipes, open or closed reservoirs and conduits as may be necessary, and lay water mains, pipes and hydrants in and along the streets, avenues, alleys and public grounds of said city of Superior as the same then existed or might thereafter be extended; said ordinance is entitled, "An ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of the said village and the inhabitants thereof, and defining their rights, privileges and powers;" and

Whereas, said ordinance was amended by an ordinance passed by said village (now city) of Superior, October 15th, 1887, entitled, "An ordinance amending and re-enacting section 13 of an ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers, and which said ordinance was further amended

by an ordinance passed October 2nd, 1889, by the common council of the city of Superior, which said ordinance is entitled as follows:

"An ordinance amending and re-enacting ordinance number five of the general ordinances of the village (now city) of Superior, entitled, 'An ordinance amending and re-enacting section 13 of an ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers,'

to which said ordinance and any amendments thereof said parties refer for greater certainty; and whereas, the laws of Wisconsin creating a city of said village, all franchises granted or contracts entered into by the village of Superior were continued in said city, and whereas said Superior Water Works Company accepted said ordinances and built said water works, and whereas the stockholders of the party of the first part at a regular meeting called for that purpose, all of the stockholders being present and voting for said resolution, and all stock being represented, and voting therefor, passed the following resolution, viz:

"Resolved, that the Board of Directors and officers of the Superior Water Works Company are hereby authorized, empowered and directed to sell, assign and convey by proper deeds of conveyance and assignment to the Superior Water, Light and Power Company, of Superior, Wisconsin, all the plant and water works of the Superior Water Works Company, situated in Superior, Wisconsin, including all lands, ways, and rights of way which may have been acquired by the said Superior Water Works Company for the purpose of constructing, operating or maintaining said works, together with all buildings, structures, houses, machinery, tools, engines, hydrants, improvements, main and distributing pipes and all things whatsoever now belonging to said Company or appertaining to said works, and all other property, real, personal and mixed, and all powers, grants, rights, privileges, benefits, contract rights, contracts, advantages, immunities, exemptions, charters, ordinances and franchises belonging to said company or appertaining to or connected with said works, including the corporate rights, privileges and franchises, and all other rights, privileges and franchises received by said company under chapter 359, special laws, 1866, of the legislature of the state of Wisconsin, being the act incorporating said company and also the ordinance under which said company built its said works and all rights thereunder granted to said Superior Water Works Company, said sale to be made on such terms as the Board of Directors shall deem advisable;" and whereas, said Board of Directors by resolution duly passed, directed that said resolution of the stockholders be carried out and authorized this conveyance to be made; now, therefore, in consideration of the sum of

three hundred and ten thousand (-310,000) dollars in hand paid, the receipt whereof is hereby acknowledged, the said party of the first part has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, assign, transfer and convey to the party of the second part, all the plant and water works of the Superior Water Works Company, party of the first part, situated in the city of Superior, Wisconsin, including all lands, ways and rights of way which may have been acquired by the said Superior Water Works Company for the purpose of constructing, operating or maintaining said works, together with all buildings, structures, houses, reservations, machinery, tools, engines, hydrants, improvements, mains and distributing pipes and all things now belonging to said company or appertaining to said works and all other property, real, personal and mixed, and all powers, grants, rights, privileges,
112 benefit, contract rights, contracts, advantages, immunities, exemptions, charters, ordinances and franchises belonging to said company or appertaining to or connected with said works, including the corporate rights, privileges and franchises and all other rights, privileges and franchises received by said company under chapter 359, special laws of 1866, of the state of Wisconsin, being the act incorporating said company and also the ordinances under which said company built its said works, and all amendments thereto and all rights thereunder granted to said Superior Water Works Company. To have and to hold the same, together with all and singular, the hereditaments and appurtenances thereunto belonging or in any wise appertaining unto the said party of the second part, its successors and assigns, forever.

In witness whereof, the said Superior Water Works Company has caused to be hereunto affixed its corporate seal and the president of said company by virtue of the authority vested in him has hereunto affixed his signature and the secretary of the said company has duly attested the execution hereof in duplicate the day and year first above written.

By R. J. WEMYSS,
President.

Attest and countersigned:

[Corporate Seal.]

F. W. DOWNER,
Secretary.

All covenants eliminated before execution.

Signed, sealed and delivered in the presence of

W. R. FANNING.
J. C. TENNIS.

113 STATE OF WISCONSIN,
Douglas County, ss:

Personally came before me this first day of November, A. D. 1889, the above named R. J. Wemyss, President, and F. W. Downer, Secretary of the Superior Water Works Company, the corporation named in the foregoing deed, to me known to be such officer and to me known to be the persons who executed such deed and severally acknowledged the same.

W. R. FANNING,
Notary Public, Douglas County, Wisconsin.

EXHIBIT "E."

An Ordinance (No. 38) amending ordinance number (2) two of the general ordinances of the village (now city) of Superior, entitled: "An ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers."

The common council of the city of Superior do ordain as follows:

Ordinance number (2) two of the general ordinances of the village (now city) of Superior, entitled: "An ordinance authorizing the city Water Works Company, its successors or assigns, to construct,
operate and maintain a system of water works in the village
114 of Superior, Douglas County, Wisconsin, and contracting with
said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers," is hereby amended by striking out section (1) one, the words, "It being understood that the territory now actually occupied and supplied with water by the system of water works in operation on Connor's Point, expressly excepted and reserved from this grant by said works, are not to be extended beyond the present occupied limits," where the same occur in said section, and also by adding to the end of said section, the following: "And provided further, that nothing herein contained shall be construed as prohibiting the sale of water from wells now in use on Connor's Point to inhabitants of said village from carts hauled by horses," so that said section as amended shall read as follows:

Section 1. For the purpose of providing for the protection of pub-
ic ' l private property in the village of Superior against fire, and for
h' 'inguishment or fire, and for the purpose of supplying the in-
a. nts thereof with pure and wholesome water, suitable for do-
nestic and public use, and in consideration of the benefits to accrue
the village of Superior by establishing and maintaining a good,
ubstantial and complete system of water works and fire protection,

there is hereby granted, subject to the right of purchase and forfeiture hereinafter provided to the Superior Water Works Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and to its successors and assigns, the privilege of establishing, maintaining and operating a system of water works, and the construction of such pipe lines, stand
115 pipes, open or closed reservoirs and conduits as may be necessary and sufficient in size, and also the laying of water mains and pipes and the placing of fire hydrants in and along the streets, avenues, alleys and public grounds of said village of Superior, in Douglas County, Wisconsin, as the same now exists or may hereafter be extended, for the supply of water suitable for domestic and other purposes for the term of thirty years from and after the passage of this ordinance. The said village of Superior shall and will abstain for the period of the said thirty years from and after the passage of this ordinance from granting to any party or parties other than the said Superior Water Works Company, its successors or assigns, the rights or privileges to lay water mains or pipes in any of the streets, avenues, alleys, public grounds or sidewalks of said village, or to furnish water to said village or its inhabitants or any portion thereof, and the said village shall and will likewise abstain from so laying water mains or pipes or so furnishing water for and on its own behalf. Provided, however, that at the expiration of the said thirty years should said village refuse to grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of water works for another term of thirty years upon the same terms and conditions as may exist between the said village or city and the said Superior Water Works Company at the expiration of the first thirty years, in and upon the public grounds and streets of the said village, and to supply the said village and the inhabitants thereof with water on reasonable terms, then and in such case the village shall purchase from said Superior Water Works Company, its successors or assigns, said system of water works and the property connected therewith at a fair valuation as provided
116 for in section 13.

Nothing herein contained shall be construed as preventing the village from maintaining the present public wells within its territory, or from digging, constructing, or maintaining additional wells, provided the water from said wells is not conducted in pipes and mains and sold to consumers and provided further, that nothing herein contained shall be construed as prohibiting the sale of water from wells now in use on Connors Point to inhabitants of said village from carts hauled by horses.

Passed and approved Dec. 13, 1889.

A. J. McRAE,
Mayor.

Attest:
J. A. KELLEY,
City Clerk.

EXHIBIT "F."

Ordinance No. 311.

(Introduced by Alderman Bertrand.)

An ordinance to amend ordinance No. 1 of the village (now city) of Superior, entitled "An ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers."

117 The Mayor and Common Council of the City of Superior do ordain as follows:

Section 1. Section 6 of said village ordinance No. 1 is hereby amended by striking out the words "The rental of all said hydrants shall be Fifty Dollars ($50.00) per hydrant" as the same appears in the ninth and tenth lines from the bottom of said section 6 (official records), and inserting in place thereof, or in lieu thereof, the words "The rental of all said hydrants shall be forty dollars ($40.00) per hydrant per annum.

Section 2. Section 12 of said village ordinance No. 1 is hereby amended so as to read as follows:

Section 12. It is further provided and ordained that the said Superior Water Works Company, its successors or assigns, for and during the term of the continuance of the franchise granted by this ordinance, may charge and collect as its annual rate for water furnished consumers a tariff not exceeding the following schedule rates, but it shall have the right at its option at any time to insert a meter into the service pipe of any consumer and supply such consumer at meter rates: (List of rates inserted here.)

Section 3. The rates to be charged and collected for rental of hydrants and for water furnished consumers, as fixed by this ordinance, shall take effect July 1st, 1896.

Section 4. Said company, its successors and assigns, shall after said July 1st, 1896, have no right, power or authority to
118 demand, receive or collect any hydrant rentals from said city, or any rates or rentals for water furnished to private consumers, higher or in excess of the said rates or rentals as hereby fixed and reduced. This ordinance being passed for the purpose of reducing rates and is to have no other effect.

Section 5 This ordinance is to take effect and become operative only upon the acceptance thereof in writing by the Superior Water, Light & Power Company, the successor in interest of said Superior

Water Works Company; such acceptance to be filed in the office of the city clerk of said city within thirty days after the date of the passage and publication of this ordinance.

Section 6. An ordinance entitled "An ordinance to amend ordinance No. 1 of the village (now city) of Superior, entitled "An ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin," passed and adopted July 21st, 1896, approved July 22nd, 1896, is hereby repealed.

ISAAC ROSS,
Acting Mayor.

Passed and adopted Aug. 11, 1896.
Approved Aug. 12, 1896.

Attest:
C. I. RONNING,
City Clerk.

EXHIBIT "G."

Ordinance No. 374.

Introduced by Alderman Larson providing for compromise of litigation and differences between the city of Superior and the Superior Water, Light & Power Company.

Whereas, there is and has been for more than two years a
119 dispute between the city of Superior and the Superior Water, Light and Power Company with reference to the rights and liabilities of the said city and company over the furnishing of water to the city and its inhabitants and hydrant rentals, and,

Whereas, the city of Superior has paid no hydrant rentals since the first of February, 1897, and has claimed and claims that it is not liable and has not been liable for said hydrant rentals during any of said time for the reasons that the said company has not furnished a sufficient supply and pressure of water in said hydrant for fire purposes, and for the further reason that the said company has failed to furnish a supply of good and wholesome water to the city and its inhabitants in accordance with the contract now in force between the said company and the city, which facts are and have been disputed by the said water company, and,

Whereas, claims have been presented to the common council quarterly by said company for the rentals of 649 hydrants and the same disallowed by the common council and appeals have been taken therefrom, or attempted to have been taken therefrom, to the circuit court of Douglas County, and afterwards transferred by change of venue to the circuit court of Ashland County, and,

Whereas, some of said appeals and actions have been dismissed by said court upon the grounds that they were not appealed in time

and the said company purposes and intends to appeal from said decisions to the Supreme Court, and the balance of said cases and pending in said circuit court, and,

120 Whereas, resolutions have been passed by the common council of the city of Superior authorizing and ordering the city attorney to commence actions and proceedings to revoke the contract for furnishing water existing between the city of Superior and the said Superior Water, Light and Power Company, and also to commence an action, or have an action commenced to annul the water franchise of said company for said reasons, and the attorneys are about ready to have said actions and proceedings commenced and the merits of all said claims and actions are questioned by the company and are in dispute, and the city claims that in a large number of said hydrants said Superior Water, Light and Power Company has not and cannot furnish a supply of water and pressure sufficient to comply with said contract or to furnish adequate fire protection to said city, and on account of all said disputes and contentions and for the purpose of compromising said litigation, proposed actions, contentions and disputes, the said Superior Water, Light and Power Company having proposed and offered to make certain alterations in its plant and system of furnishing water and to build, construct and erect an aeration and filtration plant in connection with its said water system and make other changes in its said system in case said disputes and actions can be compromised;

Now therefore, in order to effect a compromise and secure said benefits, the mayor and common council of the city of Superior do ordain as follows:

Sec. 1. That ordinance No. 1 of the village (now city) of Superior, entitled "An ordinance authorizing the Superior Water Works Company, its successors and assigns, to construct, operate
121 and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said city for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers," and all ordinances amendatory thereof be, and the same are, hereby amended and modified to the extent that the same are affected by the provisions of this ordinance.

Section 2. That for and in consideration of the covenants and agreements herein set forth and entered into between the said city of Superior and the said Superior Water, Light and Power Company, the said city of Superior and the said Superior Water, Light and Power Company *to* hereby covenant and agree to and with each other as follows, to-wit:

First. Said Superior Water, Light and Power Company shall erect, construct and have in operation on or before the first day of December, 1899, an aeration and filtration plant of the size and equipment sufficient to properly filter and purify all the water required to be furnished by said company to the city of Superior and its inhabitants and to make the same good and wholesome at all

times; the said filtration plant to be erected and constructed upon the Superior side of the bay of Superior and to conform in general to the plans already prepared by said company, and that it shall make tight the intake pipe across and under the bay of Superior or construct and put in a pipe across said bay so that no water can leak through said bay pipe into the supply of water furnished to the city and its inhabitants, and shall lay or cause to be laid a main or pipe 12 inches in diameter connecting with its present main located at the corner of Stinson and Hammond avenues in
122 said city its main located at the corner of Tower avenue and 58th street in the city of Superior; that said company shall commence said improvements at once and shall faithfully prosecute the work thereon and have the same completed on or or before December 1, 1899, and for failure to so complete the same by that date the said Superior Water, Light and Power Company shall, as liquidated damages, forfeit all hydrants rentals that shall accrue to said company from said date until said alterations or changes shall have been fully completed as herein specified, provided, however, that said water company shall be excused for any delay caused by the act of God, public enemy or strike or other causes over which it has no control, and then only for the time it is so actually delayed on said account.

Second. It is further covenanted and agreed that after April 1, 1899, the city of Superior shall only be liable in any event for the payment of hydrant rentals on 575 hydrants at an annual rental of $40.00 per hydrant on the mains now in use and in operation in the city and that all hydrants in excess of said number or the right to put in other or additional hydrants upon such mains shall be waived, discontinued and dropped so that there shall be no liability on the part of the city for any hydrant rentals upon the mains now in use in excess of the said 575. The hydrants in excess of said number and that are hereby discontinued to be designated by the city on or before July 1, 1899, and that in future extensions of the pipes and mains of the said Superior Water, Light and Power Company, the company shall not put in and the city shall not be required to take or be liable for hydrant rentals for more than ten hydrants to the mile of such extensions at an annual rental
123 of $40.00 per hydrant unless specifically ordered and agreed upon. And the Superior Water, Light and Power Company shall reduce its schedule of water and meter rates for water furnished to all consumers other than the city of Superior in addition to the 20% reduction on rates provided in franchise heretofore agreed to as follows:

First. On July 1, 1899, a reduction of 8% shall be made.

Second. When the city of Superior has a population of fifty thousand, an additional 5% reduction shall be made.

Third. When the city has a population of seventy-five thousand, an additional 5% reduction shall be made.

Fourth. When the city has a population of one hundred thousand, an additional 5% reduction shall be made.

Population to be determined by either state or national census and reductions to be computed and made upon the rates then permitted to be charged.

Hereafter all parties desiring to make water connections shall have the right to have said connections made by paying to the company a gross sum based upon the estimated cost of the materials and work upon the plant heretofore in practice, or at his election to have the connections made by the company at actual cost and, when the amount is determined, to pay such sum in full for the making of such connections, provided, however, that the said company may require security for the payment of such cost.

124 The common council of the city of Superior or its duly authorized representatives shall have the right to investigate and inspect the water plant, system and works, and every part thereof, at all reasonable times and in any manner not danger- or injurious to the plant or system.

Third. The Superior Water, Light and Power Company shall immediately dismiss and withdraw all actions, appeals and legal proceedings commenced by it for the collection of hydrant rentals claimed to be due it from the city of Superior and to receipt for and satisfy in full all of its claims for hydrant rentals up to the first day of April, 1899. The city of Superior promises and agrees to forbear the commencement of its contemplated actions and proceedings to revoke the water contract of the Superior Water, Light and Power Company and to annul its water franchise and immediately cause to be canceled, discharged and satisfied all taxes against said Superior Water, Light and Power Company for the years 1896, 1897 and 1898, and to have the same adjusted between the city and county of Douglas so that the same shall be discharged of record, provided it can be done without interest, and to pay in cash to the said Superior Water, Light and Power Company in full for all liability for hydrant rentals up to April 1st, 1899, the sum of fifteen thousand dollars, the same to be paid when the said Superior Water, Light and Power Company shall have commenced in good faith the putting in of said filtration plant.

Section 3. The provisions of this ordinance shall be and constitute a contract between the city of Superior and the Superior Water, Light and Power Company, its successors and assigns, when accepted

125 by the Superior Water, Light and Power Company, which shall be evidenced by a resolution duly passed and adopted by its board of directors and a certified copy thereof filed with the city clerk within fifteen days after its final passage and adoption by the city and shall amend said ordinance No. 1 and ordinances amendatory thereof, to the extent only that the same are affected by the provisions of this ordinance, and shall be and it is hereby made as a compromise adjustment and settlement of the differences, disputes, actions and proceedings pending and contemplated between

the city of Superior and the Superior Water, Light and Power Company, as herein set forth.

Passed and adopted June 13th, 1899.

Approved June 16th, 1899.

H. W. DIETRICH,
Mayor.

Attest:
F. J. SEGUIN,
City Clerk.

EXHIBIT "H."

Ordinance Introduced by Mayor Baxter

Declaring the intention and determination of the city of Superior to condemn, purchase and take over the plants, equipments and properties of the Superior Water, Light and Power Company for furnishing water, heat, light and power to the city of Superior and to the inhabitants thereof, and directing the calling and holding of a special election thereon and the taking of the necessary action and proceedings therefor.

The mayor and council of the city of Superior do ordain as follows:

Section 1. The city of Superior does hereby declare its in-
126 tention and decides and determines to condemn, purchase, take over and acquire the property, plants and equipments of the Superior Water, Light and Power Company, for the production, transmission, delivery and furnishing of water, heat, light, power and gas, whether within or without the city of Superior, Douglas County, Wisconsin, by condemning, taking over, purchasing and acquiring all of the right, title and interest of the said company in and to said plants, properties and equipments, and all interests, equities and liens of bondholders, mortgagees and all other parties or persons holding or having any interest therein or lien or claim thereon, or so much thereof as shall be found and determined to be necessary for such use.

Section *p*. The city clerk is hereby ordered and directed to call a special election to be held in the city of Superior on the 5th day of November, 1918, at the same places and time as the general election from 6 o'clock in the forenoon until 8 o'clock in the afternoon, by the same election officials and in connection with the general election to be held at said time, for the purpose of submitting, and to then submit to the electors of the city at such special election, the question of the city's condemning, purchasing, acquiring and taking over all such plants property and equipments or such portions thereof as shall be found and determined to be necessary, by condemning all such properties and all interests of such company

therein and all interests of bondholders, mortgage-s and all persons holding or claiming to hold any interest therein or diens thereon including all interests of bondholders and mortgagees. Such question shall be put upon the voting machines, if used and submitted and voted upon in the following form, to-wit:

127 "Shall the city acquire the water, light and power plants?"
Yes.
No.

And the city clerk is further ordered and directed to give and publish the necessary notice of such special election, and all city officers are directed to do all things, and take such actions and proceedings to carry out the provisions and purposes of this ordinance and the laws governing such matters and proceedings.

Section 3. This ordinance shall take effect and be in force from and after its passage and publication.

EXHIBIT "I."

Notice of Special City Election in re Acquiring Water, Light, and Power Plants.

Superior, Wis., Oct. 9th, 1918.

To the electors of the city of Superior:

Notice is hereby given that a special election is hereby called and will be held in the city of Superior, in the several wards and voting precincts on the 5th day of November, 1918, at the same time and places and by the same officers and in connection with the general election to be held at said time, for the purpose of voting upon the question of the city's acquiring the plants, equipments and properties of the Superior Water, Light and Power Company for furnishing heat, water, light and power to the city of Superior and its inhabitants; said question to be submitted and voted upon by the use of voting machines and in the following form:

"Shall the city condemn and acquire the water, light and power plants?
Yes.
No."

The polls to open at 6 o'clock A. M. and close at 8 o'clock P. M. at the regular voting places.

M. G. BECKLEY,
City Clerk.

128 Endorsements: 9512. Original. No. —. State of Wisconsin, Douglas County, Circuit Court. Superior Water, Light & Power Company, Plaintiff, vs. City of Superior et al., Defendants. Amended Complaint. Due personal service of the within

amended complaint is hereby admitted this 27th day of January 1919. R. I. Tipton & T. L. McIntosh, Attorney- for Defendants. Grace, Hudnall & Fridley, Attorneys for —, U. S. National Bank Bldg., Superior, Wis. Filed Dec. 3, 1919. Chas. Wickstrom, Clerk Circuit Court, Douglas County. Filed Apr. 24, 1920, Arthur A. McLeod, Clerk of Supreme Court, Wis.

129–143 In Circuit Court, Douglas County, State of Wisconsin.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'HARE and Fred C. Tomlinson, as Councilmen, of said City of Superior, Defendants.

Now comes the above named defendants and demur to the amended and supplemental complaint of the plaintiff in the above entitled action, upon the grounds and for the reasons following, to-wit:

1st. That it appears on the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

2nd. That there is a defect of parties defendant in that the Railroad Commission of Wisconsin is not made a party defendant.

R. I. TIPTON &
T. L. McINTOSH,
Attorneys for Defendants.

144–161 Circuit Court, Douglas County.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'HARE and Fred C. Tomlinson, as Councilmen, of said City of Superior, Defendants.

The defendants' demurrer to the plaintiff's amended complaint having come on to be heard before the court, the undersigned circuit judge having been duly called in and presiding, and the court having heard the arguments and considered the briefs of counsel for the respective parties,

It is ordered that said demurrer be and the same hereby is overruled and that the defendants may serve their answer to the said complaint within twenty days on payment of ten dollars costs.

Dated December 24, 1919.

By the Court,

JAMES WICKHAM,
Judge.

162–165 Be it remembered, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the second Tuesday, to-wit, on the eleventh day of January A. D. 1921, on the first day of the term, to-wit: On the eleventh day of January, A. D. 1921, Present, Robert G. Siebecker, Chief Justice, James C. Kerwin, Aad J. Vinje, Marvin B. Rosenberry, Franz C. Eschweiler, Walter C. Owen and Burr W. Jones, Justices of said Court, the following proceedings were had, Inter Alia, to-wit:

[Vignette.]

SUPERIOR WATER, LIGHT & POWER COMPANY, Respondent,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'HARE and Fred C. Tomlinson, as Councilmen, of said City of Superior, Appellants.

Appeal from Circuit Court, Douglas County, State of Wisconsin.

This cause came on to be heard on appeal from the order of the Circuit Court of Douglas County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this Court, that the order of the Circuit Court of Douglas County appealed from in this cause, be, and the same is hereby, reversed, with costs against the said respondent taxed at the sum of One Hundred Eighty-three & 50/100 Dollars, ($183.50),

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to sustain the demurrer to the complaint.

Jones, J., took no part.

STATE OF WISCONSIN, *ss:*

Supreme Court.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 14th day of July, A. D. 1921.

[SEAL.] ARTHUR A. McLEOD,

Clerk of the Supreme Court of the State of Wisconsin.

[Endorsed:] State of Wisconsin Supreme Court. Superior Water, Light & Power Co., Respondent, against City of Superior, et al., Appellants. Remittitur.

* * * * * * *

166 STATE OF WISCONSIN:

In Supreme Court.

No. 153.

SUPERIOR WATER, LIGHT & POWER COMPANY, Respondent,

vs.

CITY OF SUPERIOR et al., Appellants.

Action to enjoin the city of Superior and its officers from proceeding under the provisions of secs. 1797*m*-1 to 1979*m*-109 Stats., to acquire the water works and property of the plaintiff, and compelling the city to compensate the plaintiff for its property according to the provisions of a certain ordinance of the city of Superior granting to the plaintiff a franchise to build, operate and maintain waterworks in said city. From an order overruling a demurrer to the complaint the defendants appealed.

The complaint shows that the Superior Water Works Company (hereinafter referred to as the Water Company) was incorporated by ch. 359 of the private and local Laws of Wisconsin for the year 1866. By the terms of the act it was provided that said company may, for the purpose of supplying the town of Superior and its neighborhood with pure water, "enter upon any lands, streets, highways, roads, lanes or public squares through which they may deem it proper to carry the water so taken, and lay, construct, repair and replace any pipes, conduits, hydrants, jets, fountains," etc., and that

"the said company may make any agreements, contracts,
167 grants and leases for the sale, use and distribution of water as may be agreed upon between said company and any person or persons, associations and corporations, and with the town of Superior, or neighboring towns, or the said company itself may take and use the surplus water for manufacturing and other purposes; which said agreements, contracts, grants and leases shall be valid and effectual in law."

On the 15th day of October, 1887, the village of Superior was a duly incorporated village under the laws of the state of Wisconsin. On that date the village board of the village of Superior, for the purpose of providing for the protection of public and private property in said village against fire, and supplying the inhabitants thereof with water for domestic and public uses, passed an ordinance granting to the Superior Water Works Company the privilege of establishing, maintaining and operating a system of water works in said city, in and by the terms of which it was provided that the said village of Superior grant to no other party or parties a similar franchise for the period of thirty years, and that "at the expiration of the said thirty years, should the said village refuse to grant to the said Superior Water Works Company, its successors and assigns, the

right to continue and maintain said system of water works for another term of thirty years, upon the same terms and conditions as may exist between the said village or city and the said Superior Water Works Company, at the expiration of the first thirty years, in and upon the public grounds and streets of the said village and to supply the said village and the inhabitants thereof with water on reasonable terms, then and in such case, the village shall purchase from said Superior Water Works Company, its successors or assigns, said system of water works and the property connected therewith, at a
168 fair valuation as provided for in sec. 13."

By sec. 13 it was provided that the city might purchase and the company bound itself to sell its property, franchises, etc., to the city at the expiration of ten years from the passage of the ordinance, and at intervals of five years thereafter, in which case the village and the company were each to select an appraiser, the two to select a third, who should determine the value of the said water works; their valuation to constitute the purchase price to be paid therefor.

It was provided that the main source of water supply should be the Bay of Superior, and that the water should be filtered through a sand-filled crib, and then by an additional process of mechanical filtration, either by the "Hyatt System" or some other system of filtration giving equally pure water. "It being agreed that the water so filtered is to be pure and wholesome and suitable for both public and domestic use." It was also provided that if the said village of Superior shall procure for the said Superior Water Works Company without cost or expense to said company the valid and indefeasible right to extend and lay its pipes across the said Bay of Superior and across Minnesota Point to the shores of and into Lake Superior on and along the shortest line from the location of its pumping station to the shores of said Lake, the said Superior Water Works Company shall within one year after receiving notice of the acquirement of said right of way, extend its pipes into Lake Superior and take the supply of water therefrom.

On March 25, 1889, the territory constituting the village of Superior was incorporated into the city of Superior under the laws of Wisconsin for the year 1889. On November 1, 1889, said Superior Water Works Company sold, assigned, transferred and con-
169 veyed to the plaintiff, Superior Water Light & Power Company its said water works system and all its property, real and personal, and all its rights under the ordinances of the village or city of Superior. On October 1, 1889, the city council of the city of Superior passed and adopted the following ordinance:

"Section 1. Ordinance number 5 of the general ordinances of the village (now city) of Superior, entitled 'an ordinance amending and re-enacting section 13 of an ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers,' is hereby

amended by striking out of said ordinance all of said ordinance after the words 'Section 13,' where the said words 'Section 13' occur, in the thirteenth line thereof and inserting in lieu thereof the following:

This ordinance is passed upon the express condition that at the expiration of twenty years after the date of the passage of this ordinance and of every fifth year thereafter, the city of Superior may, at its option, purchase from the said Superior Water Works Company, its successors or assigns, the entire plant of the said Superior Water Works Company, its successors or assigns, and including all franchises theretofore granted to said Superior Water Works Company, its successors or assigns, by the village or city of Superior, by paying therefor, in cash, an amount of money of which the net earnings of said Superior Water Works Company, for the year next preceding the purchase thereof, by said city, shall be five per centum. Such purchase shall be made in the following manner, to-wit: The common council at its first regular meeting after the expiration of said twenty years, or of any fifth year thereafter, may pass an ordinance declaring its intention to purchase said plant and franchises appropriating the necessary funds therefor and directing the city clerk of said city, to serve upon said Superior Water Works Company, its successors or assigns, a copy of said ordinance, together with a notice that at the expiration of one year from the date of the service of said notice, the said city will pay to said Superior Water Works Company, its successors or assigns, the price of said plant and franchises, determined as by this ordinance provided, and will assume possession of said plant and franchises. Commencing with the day following the date of the service of such notice, the said Superior Water Works Company, its successors or assigns, shall keep an accurate account of all receipts and disbursements of said company, in a set of books kept expressly for that purpose and for no other, which said books shall at the expiration of each quarter year thereafter be open to the inspection of the city comptroller of said city. At the expiration of one year from the date of the service of the notice above provided for, the said Superior Water Works Company, its successors or assigns, shall submit to the comptroller of said city, the said books of account, and the price to be paid for said plant and franchises shall be determined therefrom, as hereinbefore provided and upon the payment, in full, of said price, the said Superior Water Works
170 Company, its successors or assigns, shall surrender to said city its said plant and franchises complete. The words 'net earnings' as used in this ordinance, shall mean the gross earnings of said water works, less the actual operating expenses thereof.

Section II. This ordinance is passed upon the consideration to the city of Superior that the said city is hereby released and relieved from the duty, cost and expense of procuring, for said Superior Water Works Company, the valid and indefeasible right to extend and lay its pipes across the Bay of Superior and across Minnesota Point, to the shores of, and into Lake Superior, as provided in section 2 of said ordinance number one of the general ordinances of the village of Superior and that all that part of said section No. 2, commencing

with the word 'provided' in the twentieth line thereof, down to and including the word 'completed' in the sixty-second line thereof, is hereby repealed. And this said ordinance is passed upon the further consideration to the city of Superior, that by the acceptance hereof the said Superior Water Works Company binds itself, its successors and assigns, to obtain at its own expense an adequate supply of good and wholesome water for domestic and public purposes from said Lake Superior and to furnish the same to the inhabitants of said city and to said city as provided in said ordinance number one as hereby amended within two years from the acceptance of this ordinance by said Superior Water Works Company.

Section III. This ordinance is passed with the consent of the Superior Water Works Company and upon filing a written acceptance by it with the city clerk of the said city of Superior the said ordinance with all other ordinances of said city or the village of Superior granting to the said Superior Water Works Company any rights or franchises shall be and become and is hereby made a binding contract as so amended and modified."

It is alleged in the complaint that the franchise of the plaintiff expired on October 15, 1917, and thereupon it became and was the duty of the city of Superior to purchase the said water works system and the property connected therewith from this plaintiff pursuant to the provisions of its franchise-ordinance, as set forth in the statement of facts herein, unless the city of Superior should elect to grant to said plaintiff the right to continue and maintain said system of water works for another term of thirty years under the same terms and conditions as existed on said October 15, 1917, between the said city of Superior and the plaintiff; that the plaintiff requested the mayor and council of said city to determine whether said city would purchase said water works system or would exercise its election to renew said franchise, and that thereupon the mayor and council
171 wholly repudiated the obligation of said city to purchase said water works system under the provisions of the ordinance or franchise, and denied the existence and validity of the contract on the part of the city to purchase as aforesaid, and began proceedings under the provisions of the public utility laws, secs. 1797*m*–1 to 1797*m*–109 of the Wisconsin Statutes to acquire the said water works system together with other property of this plaintiff, and on October 8, 1918, the mayor and council of said city passed and adopted a resolution declaring the intention and determination of said city to condemn, purchase and take over the plants, equipments and properties of the plaintiff and directing the calling and holding of a special election thereon and the taking of the necessary action and proceedings therefor; that said election was held, and a majority of the votes cast were in favor of acquiring said plant under the provisions of said public utility law.

172 OWEN, *J.*:

The complaint discloses the fact that the city of Superior ha determined to take over the plant, property and equipment of th Water Company, and the real question in controversy is whether th compensation to be paid by the city is to be determined in the man ner provided in the franchise-ordinance or pursuant to the provision of the public utility law, secs. 1797*m*-1 to 1797*m*-109 Wisconsi Statutes.

The original franchise was granted by the village of Superior t the Superior Water Works Company, plaintiff's assignor, by an ordi nance passed and adopted October 15, 1887. In and by the terms o that ordinance it was provided that "should the said village refuse t grant to the said Superior Water Works Company, its successors o assigns, the right to continue and maintain said system of wate works for another term of thirty years, upon the same terms and con ditions as may exist between the said village or city and the sai Superior Water Works Company, at the expiration of the firs thirty years, in and upon the public grounds and streets of th said village and to supply the said village and the inhabitants thereo with water on reasonable terms, then and in such case, the villag shall purchase from said Superior Water Works Company, its suc cessors or assigns, said system of water works and the property con nected therewith, at a fair valuation as provided in sec. 13."

Section 13 provided, in a comprehensive way, for the appraisa of the property of the water works company by three appraisers, i the event that the city should exercise any of the various options re served to it in the franchise-ordinance to purchase the plant. Th water supply was to be taken from the Bay of Superior. The Wate

Company was required to filter the water through a sand
173 filled crib, and then by an additional process of mechanica filtration, either by the "Hyatt System" or some other systen of filtration giving equally pure water. It was also provided that i the said village "shall procure for the said Superior Water Work Company without cost or expense to said company the valid and in defeasible right to extend and lay its pipes across the said Bay of Su perior and across Minnesota Point to the shores of and into Lake Su perior," the said Water Company shall extend its pipes into Lak Superior and take therefrom the supply of water for the said village

After the incorporation of the city of Superior this franchise-or dinance was amended by an ordinance passed and adopted by th common council of the city of Superior under date of October 1 1889, set forth in the statement of facts. This ordinance releasec and relieved the city of Superior from the duty of procuring th right-of-way across Minnesota Point in order to enable the Wate Company to extend its pipes and mains into Lake Superior, and bound the Water Company to obtain at its own expense an adequat supply of good and wholesome water from said lake. It also amendec sec. 13 so as to provide that in case of the taking over of the plant property and equipment of the Water Company, the city should pay

therefor an amount of which the net earnings of said Water Company for the year next preceding the purchase thereof by said city shall be five per centum, to be determined in the manner provided in and by the terms of the amending ordinance.

It is earnestly contended by respondent that this ordinance constitutes a contract, entered into by the city in its proprietary capacity, which is immune from subsequent legislative interference. An orderly consideration of the issues presented requires that we first determine the character and effect of this ordinance. It is to be
174 noted that it was adopted as an amendment to the original franchise-ordinance. True, there was an exchange of equivalents between the city and the Water Company, inducing the consent of both parties to the amendment. The Water Company was relieved of the necessity of maintaining filtration plants; the city was relieved of its obligation to procure the right-of-way across Minnesota Point, and a different method was provided for determining the amount which the city was to pay for the plant in case it should exercise its option to buy the same. For aught that appears in the complaint, this might have resulted to the advantage of either party, or that advantage might have rested entirely in a simple and definite method of fixing the amount of the purchase price.

The effect of this ordinance was to amend the original franchise-ordinance. Thereafter, the franchise of the Water Company was evidenced by the original franchise-ordinance of the village of Superior, as amended by the ordinance of October 1, 1889. Thereafter, the franchise of the water company provided that in case of the purchase by the city of the plant, property and equipment of the Water Company the city should pay compensation therefor to be determined in the manner provided in the franchise, which was the manner provided for in the amendment.

"When an amendment to a statute is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, namely, the statute as amended." Black, Interpretation of Laws, (2 ed.) p. 574. The amendatory ordinance was merged in and became a part of the original franchise, and the right of the Water Company to insist that its property shall be valued as therein provided is no greater than if the method had remained as originally provided therein. This particular feature of the Water Company's franchise, therefore, stands on no different footing
175 with reference to the power of the state to interfere therewith than any other provision contained in the ordinance.

It is well settled in this state that an ordinance of this kind constitutes a legislative franchise emanating from the state to the corporation. The common council acts as the agent of the state, and the privileges conferred by its ordinance are as much a legislative franchise as if it had been granted by an act of the legislature. State ex rel. Attorney General v. The Madison Street R. Co. 72 Wis. 612; The State ex rel. The Cream City R. Co. v. Hilbert, ib. 184; The City of Ashland v. Wheeler, 88 Wis. 607; The State ex rel. Attorney General v. Portage City Water Co. 107 Wis. 441. And in case the

corporation fails to comply with the requirements of the ordinance, or fails to perform any of the duties imposed upon it by the terms thereof, the state may maintain proceedings to vacate its charter or forfeit the franchise. State ex rel. Attorney General v. The Madison Street Railway Company, 72 Wis. 612; Stedman v. The City of Berlin, 97 Wis. 505; The State ex rel. Attorney General v. Portage City Water Company, 107 Wis. 441. The franchise granted to the Superior Water Works, therefore, was a legislative franchise granted by the state, and the state has the same right and authority to interfere therewith, change or alter the same, as though it were granted directly by the legislature, as in the case of State v. Milwaukee Gas Light Company, 29 Wis. 454.

We now come to consider the question of the effect of the enactment of the public utility law (secs. 1797*m*-1 to 1797*m*-109 Wisconsin Statutes) upon respondent's franchise. That law was originally enacted by ch. 499 of the Laws of 1907. By its terms, any public utility, as therein defined, was authorized to surrender its then existing franchise and take in lieu thereof a franchise under the
176 public utility law, called an indeterminate permit. This indeterminate permit was subject to the provisions of the public utility law, which in effect thereafter constituted its charter. The respondent did not act under the optional provision of this law, did not surrender its franchise and did not accept the indeterminate permit provided for by the public utility law. By ch. 596 of the Laws of 1911 this optional feature of the public utility law was made mandatory, and it provided that every license, permit or franchise granted to a public utility prior to July 11, 1907, is so altered and amended as to constitute and to be an indeterminate permit within the meaning of that law. The act also grants to any municipality power to acquire by condemnation any public utility in the manner therein prescribed, and it is under and by virtue of such provisions that the city is proceeding for the acquirement of the plant, property and equipment of the respondent.

Respondent contends that the legislature had no power to arbitrarily deprive it of the franchise conferred upon it by the village and city ordinances heretofore mentioned, and that not having voluntarily submitted to the provisions of the public utility law it is not bound thereby. The public utility law has been under consideration by this court a number of times (Manitowoc v. Manitowoc & Northern T. Co. 145 Wis. 13; LaCrosse v. LaCross Gas & Electric Co. 145 Wis. 408; City of Kenosha v. Kenosha Home Telephone Co. 149 Wis. 338) and declared valid in the light of the objections there raised to its validity. In none of those cases, however, was the question presented of the power of the legislature to substitute the public utility law in lieu of a local municipal franchise against the consent of the public utility. In each of
177 those cases the public utility had voluntarily surrendered its existing franchise and taken in lieu thereof the indeterminate permit and submitted itself to the provisions of the public utility law. The question here raised, therefore, as to the power of the legislature to compel the substitution of the public utility law

for the existing franchise against the consent of the public utility, confronts us as an original proposition.

Concededly he power of the state to work this substitution of franchises rests upon the reserved power of the constitution; found in sec. 1 of art. XI, which reads as follows:

"Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage.

Respondent contends that this provision of the constitution has no application to the ordinance constituting its franchise, and that it does not confer power upon the legislature to alter or amend the same. Its contention is, that the only general laws or special acts which could be enacted under the provisions of this section are those under which a corporation is formed or created, hence it is only laws for the formation of corporations which may be altered or repealed. Counsel points a distinction between what he calls a corporate franchise, that is, a franchise granting corporate existence and which is not the property of the corporation, and a franchise acquired by a corporation after corporate existence commenced, that it may part with or be deprived of without affecting its corporate existence and which may survive the death of the corpora-
178 tion. As we shall have occasion frequently to refer to these different classes of franchises as we proceed we shall, for brevity, refer to the former as the primary, and to the latter as the secondary, franchise of a corporation. We shall refer to the power to alter or repeal, mentioned in sec. 1, art. XI of our constitution, as the reserved power.

Counsel for respondent rests his contention that this reserved power is limited to the alteration or repeal of the primary franchise of a corporation, upon a consideration and analysis of the literal terms of sec. 1, art. XI. While we are not disposed to disparage or question the legitimacy of counsel's logic, we must decline to follow him into an inviting field of inquiry. We think the time has long since passed when the consideration of this clause in this respect may be considered an original proposition. This clause of our constitution received consideration at a very early day, and its scope and purpose was declared in the early decisions of this court, ranging from the third to the thirty-fifth Wisconsin Reports. It was considered in two cases in the third Wisconsin (The Madison W. & M. Plankroad Co. v. Reynolds, 287; Pratt v. Brown, 603), but six years after the adoption of the constitution. It was also under consideration in Nazro v. The Merchants Mutual Ins. Co. 14 Wis. 295; Kenosha, Rockford & Rock Island Railroad Co. v. Marsh, 17 Wis. 13; Whiting v. The Sheboygan and Fond du Lac Railroad Co. 25 Wis.

167; State of Wisconsin v. The Milwaukee Gas Light Co. 29 Wis. 454; The Attorney General v. Railroad Companies, 35 Wis. 425; The West Wisconsin R. R. Co. v. The Board of Supervisors of Trempealeau County, 35 Wis. 257. It is manifest from a perusal of those cases that there was no confusion in the minds of the
179 then members of this court concerning the object, scope or purpose of the provision. While what was said in some of those cases with reference to this reserved power was possibly obiter, we regard the expressions of opinion as authoritative nevertheless, whether obiter or material to the question involved. There is a uniformity of opinion running through all of those cases with reference to the scope and purpose of this constitutional provision characterized by an assurance that suggests a thorough understanding of the subject treated, and in none of these cases do we find an intimation that the reserved power is confined to the primary franchise of a corporation.

In Madison W. & M. Plankroad Co. v. Reynolds, 3 Wis. 287 it was held that a power of alteration reserved in an act amending the act incorporating the company, which amendment was accepted by it, reserved to the legislature the power to alter the rate of toll provided in the Charter act.

In Pratt v. Brown, 3 Wis. 603 it was held that the legislature under the reserved power, in repealing the mill-dam law, had power to divest a corporation of its franchise of easement to flow lands acquired thereunder.

In Nazro v. Insurance Company, 14 Wis. 295 was involved an amendment to the special act incorporating the insurance company, by which the trustees were authorized to change the company from a mutual to a stock company, thus changing the contract relation between the corporation and its members without their consent. The power of the legislature to pass the amending act was rested upon the reserved power of the constitution.

Kenosha, etc. Ry. Co. v. Marsh, 17 Wis. 13 involved an act of the legislature amending a special railroad incorporation act, changing the lines of road. It was held that this change released
180 the subscribers to the company's stock. In this connection it was considered whether the constitutional reserved power might operate to give the amending act the effect to bind the stock subscribers. In that case it was said that the object of the reserved clause was to avoid the effect of the decisions of the federal supreme court holding corporate charters to be contracts protected under the federal constitution, "so as to enable the state to impose such salutary restraint upon these bodies as experience might prove to be necessary," and adding: "Undoubtedly the legislature might, under this power, impose new duties and new restraints upon corporations in the prosecution of enterprises already undertaken. And provisions of this nature would be binding whether assented to or not."

In Whiting v. Sheboygan etc. Ry. Co., 25 Wis. 167 the reserved power is discussed arguendo, and it is said that the power of the state to regulate the tolls of railroad companies cannot be lost, because the power is reserved to the legislature under sec. 1, art. XI

of the constitution, to alter or repeal all charters or acts of incorporation, and to limit tolls and fares to a reasonable sum.

In State v. Milwaukee Gas Light Co. 29 Wis. 454, where a charter granting an exclusive franchise to supply gas to the city of Milwaukee, was under consideration, the court declared that "the legislature retains control over such charters in this state, and has the power to take away any exclusive privilege or franchise which it may have improvidently granted."

In Chapin v. Crusen, 31 Wis. 209, 215 the court, in holding that the legislature might repeal a dam franchise granted to natural persons, referred to sec. 1, art. XI of the constitution, and said, arguendo: "Had this franchise been conferred on such a corporation, there can be no doubt that the legislature might take it away."

181 In the West Wisconsin Railway Company v. Board of Supervisors of Trempealeau County, 35 Wis. 257 it was held that an act of the legislature subjecting to taxation certain lands of a railroad company which had been exempted from taxation by a prior act separate and apart from the act of incorporation, was a valid exercise of the reserved power. In that case Cole, J., gives elaborate consideration to the scope and purpose of the reserved clause of the constitution, saying among other things:

"The object and historical origin of the provision in the constitution of this state are matters known to all professional men. They were, through this paramount authority, to retain and secure to the state full power and control over corporate franchises, rights and privileges which it might grant,—a power and control which the state was in a measure deprived of by the federal constitution, as that instrument had been interpreted in the celebrated Dartmouth College case. With the grant of exemption from taxation was annexed the reservation that such grant might be altered or revoked by the legislature at any time after its passage. It was a qualification of the grant, and the subsequent exercise of the reserved power cannot be regarded as an act impairing the obligation of contracts."

In Attorney General v. Railroads, 35 Wis. p. 562 et seq., the question of the reserved power also receives elaborate consideration by Ryan, C. J. The previous decisions of this court are reviewed, the Dartmouth College case is considered and criticised, its baneful consequences to the public interest is pointed out, that the purpose of the reserved power was to save the state from the pernicious effects of that decision, is declared, and it was distinctly held that ch. 273 Laws of 1874 fixing the maximum rates to be charged by railroad companies was a valid exercise of legislative power notwithstanding the charters of such railroad companies granted them unlimited right to impose rates and charges in their discretion. In summarizing the law upon that question, (p. 574) it is said:

182 "And, by force of the constitutional power reserved and of the uniform construction and application of it, the rule in the Dartmouth College case, as applied to corporations, never had

place in this state, never was the law here. The state emancipated itself from the thraldom of that decision, in the act of becoming a state; and corporations since created here have never been above the law of the land."

The early judges who thus discussed, considered and applied this clause of our constitution were of a time when the decision of the Dartmouth College case was still a subject of criticism and resentment. The reserved power was an invention of their generation, and they understood well its purposes. Prompted by the suggestion of Mr. Justice Story in his concurring opinion in that case, that if the states desired to retain the power to alter or amend corporate charters they should reserve it in the grant, many states provided by general statutes that all corporate grants should be subject to the power to alter or amend. Other states made similar provision in the respective charters as granted, while still others, subsequently coming into the Union, including our own, reserved such power in the constitution. While there was a lack of similarity in the language used, the purpose intended to be accomplished was uniform. The purpose of all the states was to preserve a well-recognized incident of sovereignty, the right to regulate and control corporations of their own creation, to the end that the recipients of corporate grants—which may seem wise to-day and prove improvident tomorrow—should not be permitted to convert the bounty of the state into an instrument for the oppression of its people. This result could not be accomplished by a reservation of power to alter or amend the primary franchise of the corporation. It is the use made of the secondary franchise, grants in the nature of property which may be turned to the public detriment, that must be kept under the control and regulation of the state if the generosity of the state is
183 not to be turned to the exploitation of its people. And so far as our investigations have gone, reserved clauses of this character have been given the scope and effect necessary for the accomplishment of this purpose. "The reservation affects the entire relation between the state and corporation, and places under legislative control all rights, privileges and immunities derived from its charter directly from the state." Tomlinson v. Jessup, 15 Wall. 454.

The Supreme Court of the United States has been liberal in its construction of similar provisions reserving to the states power to alter or amend corporate charters, as a consideration of the following cases decided by that court will indicate: Tomlinson v. Jessup, 15 Wall. 456; Miller v. State, 15 Wall. 478; Holyoke Co. v. Lynam, 15 Wall, 500; Shields v. Ohio, 95 U. S. 324; Maine Cent. R. Co. v. Maine, 96 U. S. 500; Greenwood v. Freight Co. 105 U. S. 17; Atlantic & G. R. Co. v. Georgia, 98 U. S. 361; Close v. Cemetery Co. 107 U. S. 466; Waterworks v. Schottler, 110 U. S. 353; Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U. S. 258; New York & N. E. R. Co. v. Town of Bristol, 151 U. S. 556; Pennsylvania College Cases, 13 Wall. 190; Sinking Fund Cases, 99 U. S. 700; Stanislaus

County v. San Joaquin and King's River Canal and Irrigation Co. 192 U. S. 201.

The disposition of the federal supreme court to construe all such reservations to give effect to the evident spirit and purpose thereof, is indicated in Railroad Company v. Georgia, 98 U. S. 359. An act of the legislature of Georgia incorporating a railroad company conferred upon it a limited exemption from taxation. A section of the general statutes of that state provided that "in all cases of private charters hereby granted the state reserves the right to with-
184 draw the franchise unless such right is expressly negatived in the charter." It was held that a subsequent legislative act taxing the property of such corporation as other property in the state was taxed was not prohibited by that provision of the Constitution of the United States which declares that no state shall pass a law impairing the obligation of contracts. The court said:

"No such right was negatived in the charter granted to the plaintiffs in error. Consequently the franchise was held subject to a power in the State to withdraw it, and subject to be changed, modified or destroyed at the will of its grantor or creator. These provisions of the code became, in substance, a part of the charter. It is quite too narrow a definition of the word 'franchise' used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every and any right or privilege which is a part of the franchise."

It is apparent that a narrow or literal construction of the reservation provision found in this statute of the state of Georgia would have limited the reserved power to the franchise to be a corporation; but, without hestitation, the court pronounces that "too narrow a definition of the word 'franchise' " and very readily construes it to apply to what we here term the secondary franchise of a corporation. In doing so, the court simply gave effect to the general understanding concerning the purpose and scope of such reservations, and such is the spirit in which the reserved power of our own constitution was construed by early decisions of this court.

185 While there has been no general discussion of the nature and scope of the reserved power in the decisions of this court subsequent to Attorney General v. Railroads, supra, that feature thereof seemingly having been considered as settled by the elaborate consideration there given it, it nevertheless has been frequently applied by this court since that time to justify legislation modifying corporate grants in the nature of secondary franchises, as will be seen by the following cases:

In The State ex rel. Cream City R. Co. v. Hilbert, 72 Wis. 184 it was held that the legislature, under the constitutional reserved power, could and did alter the terms of a street railway franchise previously granted fixing the rates of license fee per car which it

required to be paid to the city. In that case the original license fee was fixed by a city ordinance enacted under the terms of a general law. The franchise privilege in no way related to the franchise to be a corporation and clearly not essential to corporate existence.

In Ashland v. Wheeler, 88 Wis. 607, although the statement is obiter in the case, the court declared that the legislature under the reserved power may alter and regulate the rates of a public service company as prescribed in the municipal franchise-ordinance.

In Chicago, Milwaukee & St. Paul R. Co. v. Milwaukee, 97 Wis. 418, in an opinion by Mr. Justice Marshall, it was held that a Wisconsin railroad corporation is not entitled to damages for the crossing of its tracks by a highway, nor to compensation for the cost thereby imposed upon it of constructing crossing gates, cattle guards, planking between the rails or other structures required to
186 make a safe crossing, because the burden of these structures could be imposed upon the company under the police power and under the power reserved in sec. 1, art. XI of the state constitution to amend corporate charters. In the course of the opinion it is said:

"It may be laid down as established beyond reasonable controversy that railroad corporations are subject to all such reasonable regulations as may from time to time be prescribed by legislative authority, pursuant to the police power incident to the sovereignty of the state, and are also subject to the power reserved under the constitution, to alter or amend corporate charters."

In State v. Railway Company, 128 Wis. 449, at p. 505 the reserved power of the constitution was invoked to sustain the general laws fixing the license fees to be paid by railroad companies to the state. The successive statutes involved are treated as a part of the corporate charters of the railroad companies as inhering therein, but the rights affected were clearly not rights essential to corporate existence, nor a part of the franchise to be a corporation.

In Manitowoc v. Manitowoc & Northern Traction Co. 145 Wis. 13 it was said, in an opinion by Mr. Justice Barnes, that the right conferred on a street railway company to use the public streets under sec. 1862 or sec. 1863 Stats., becomes one of the corporate franchises of the corporation to which it is granted, the city acting as the delegated agent of the state in granting it, and that the reserved power of amendment or repeal contained in sec. 1, art. XI of the constitution would seem to empower the legislature to modify the conditions on which such franchise was given, as well as to repeal or amend the franchise itself.

The only suggestion coming from any member of this court, from the beginning of state government down to the present time, that the reserved power does not extend to the secondary
187 franchises of a corporation, is found in an independent opinion, in the nature of an erratum, filed by Mr. Justice Marshall in the case of Calumet Service Company v. City of Chilton, 148 Wis. 334. In that opinion he speaks of the difference between the fran-

chise of a corporation and a franchise granting corporate existence, and intimates that the reserved power of the constitution applies only to the primary franchise, which he calls a corporate franchise. In his dissenting opinion, concurred in by Mr. Justice Vinje, filed in the case of Milwaukee E. R. & L. Co. v. Railroad Commission, 153 Wis. 592 the same learned Justice, for whose ability we entertain the highest regard, gives additional expression to the view that it is only the franchise granting corporate existence that is within the reserved power. In those opinions it was assumed by the learned Justice who wrote them that the distinction between the primary and secondary franchise of a corporation had been overlooked in some of the prior decisions of this court, and suggested that such distinction was pointed out in State ex rel. Attorney General v. Portage City Water Co. 107 Wis. 441; Linden Land Co. v. Milwaukee E. Ry. & L. Co. ib. 493; Pittsburg Testing Laboratory v. Milwaukee E. R. & L. Co. 110 Wis. 633; In re Southern Wisconsin Power Co. 140 Wis. 245. It is true that the distinction between the two classes of franchises was referred to in those cases, but not for the purpose of applying the reserved power we are now considering. Questions did arise in those cases which made the distinction between the two classes of franchises germane to the discussion, but in none of them was the reserved power involved or mentioned.

In State ex rel. Attorney General v. Portage City Water Co., 107 Wis. 441, the action was brought by the attorney general to forfeit the water works franchise granted by the city of Portage
188 to certain individuals and subsequently assigned by them to the defendant, a foreign corporation. The question was whether the privileges granted by the ordinance constituted a franchise emanating from sovereign authority within the meaning of that term as used in sec. 3466 Wisconsin Statutes. Much is said in the opinion concerning the franchises to be, and other franchises of, a corporation, but not a word is said concerning the reserved power.

In Pittsburg Testing Laboratory v. Milwaukee E. R. & L. Co., 110 Wis. 633 the question was whether plaintiff was entitled to a mechanic's lien on a certain power house, the answer to which was held to depend on whether the property was essential to the maintenance and operation of the defendant's system of street railways for which the defendant corporation was established. The reserved power was not involved and was not mentioned.

The question presented in the Linden Land Company case, supra, was this: An ordinance of the city of Milwaukee granted to a street railway company the right to lay its tracks upon certain streets in the city of Milwaukee. The validity of this ordinance was challenged because it granted corporate powers or privileges which, as it was claimed, could be granted only by general law, by reason of sec. 31, art. IV of the state constitution prohibiting the legislature from enacting any special or private laws for granting corporate powers or privileges, except to cities, and sec. 32 art. IV requiring the legislature to provide general laws for the transaction of any business prohibited by sec. 31. It was there held that sec. 31, art. IV of the

constitution applied only to the primary franchise of a corporation, and that all other franchises or privileges might be granted by special act.

189 Unless it be kept in mind that sections 31 and 32 of art. IV of the constitution were added by amendment adopted in 1871, some confusion is likely to arise in reading the provision of sec. 31 in conjunction with sec. 1, art. XI of the constitution. Sec. 31 was not in the constitution as originally adopted. Sec. 1, art. XI was the only provision therein relating to the formation of corporations without banking powers. It provided that "corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for muncipal purposes, and in cases where in the judgment of the legislature the objects of the corporation cannot be attained under general laws. All general laws or special act enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

The query naturally arises, What was the effect of the adoption of sec. 31 of art. IV upon the power reserved in sec. 1 of art. XI? That question arose in Attorney General v. Railroad Companies, supra, decided in 1874, but three years after the adoption of the amendment. The identical question there presented was whether a charter granted by special act could, after the adoption of the amendment, be amended by special act. The court dwelt upon the purpose of the amendment. It was held that the purpose was to make mandatory the directory provision contained in sec. 1, art. XI that corporations should be formed under general laws. With reference to the effect of the amendment upon the reserved power, the court said:

"We shall not stop to dwell here on the importance of the reserved power. We may do that later, in a more appropriate connection. We shall only assume here that it is a power of great significance and gravity; of such moment, that it is impossible to believe that
190 the legislature and the people intended to surrender or impair it; very hard to believe that they suffered themselves to surrender or impair it, by implication, in an amendment designed for quite a different purpose, quite consistent with the reserved power."

And there the phrase in the amendment "to grant corporate powers and privileges" was held to mean "in principio donationis, and equivalent to the phrase, to grant corporate charters. This is implied not only by the word grant, but also by the word corporate. A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise; that is, as we understand it, franchise by act of incorporation." When these excerpts from Attorney General v. Railroad Companies are read in connection with the further extended discussion of the reserved power therein contained, to which we have heretofore adverted, we think there can be no doubt that it was there held that the amendment of 1871 had no effect whatever upon the reserved power, and that its original force and vigor remained unimpaired.

The effect of the amendment as well as its purpose was to require the formation of corporations under general laws. Other franchises, such as the right to build dams, construct reservoirs, use public streets, etc., might thereafter as before be bestowed upon them by special act. This was the holding in the Linden Land Company case, supra, and the reserved power of the constitution was not there mentioned or considered.

In re Southern Wisconsin Power Company, 140 Wis. 245 involved a question similar to that considered in the Linden Land Company case. and the ruling of the latter case was followed. The reserved power was not in question, nor was it discussed.

The case of La Crosse v. La Crosse Gas & Electric Co. 145 Wis. 408 is also cited by Mr. Justice Marshall in his dissenting opinion in the Milwaukee E. R. & L. Co. v. Railroad Commission, supra, 191 and much reliance is placed thereon by the attorney for the respondent here. If there is anything in that case which casts doubt upon the scope of the reserved power as we construe it, it is ambiguous indeed. (The corrective opinion filed by Mr. Justice Marshall in the Calumet Service Company case, supra, was intended to correct certain misimpressions which he thought might be given by the language used in that case.) It was said therein, speaking of the franchise of the Gas & Electric Company granted to it by the city of La Crosse. "The entirety was a state grant and so under legislative control like any other corporate state franchise." And further: "Whether mere contractual features, as between the state or any instrumentality used by it in conferring special privilege, and its grantee, inhering in the privilege itself, the franchise not being corporate, are within the reserved power to alter, amend or repeal under sec. 1, art XI, of the constitution, need not be discussed for the reason stated. What the plaintiff did, if anything of a contractual nature, since it appertained to the franchise itself; the state did. What the two real parties to the transaction mutually did, obviously, they could mutually undo." And here is the language upon which counsel for respondent so strongly relies:

"Though we thus leave a subject treated in the briefs of counsel, with passing notice, it is not to be taken as doubting the state of the law on the question. One needs, in respect to it, to distinguish between corporate franchises; in the sense of the right to corporate existence, and corporate franchises, as the term is often, not very accurately used; in the sense of, a privilege owned by a corporation in its proprietary capacity; a thing granted which when accepted is property,—may be acquired or parted with as any other property might, barring special legislative restrictions. (Citing) The distinction has not always been appreciated; (Citing) and remarks with reference thereto in cases cited above and comparison therewith of Ashland v. Wheeler, 88 Wis. 607, and the language of and premise subject dealt with in sec. 1, art XI of the constitution."

Whatever was in the mind of the learned Justice who wrote that opinion with reference to the reserved power of the constitu-
192 tution, we would not be justified in seizing upon these cursory and passing remarks as an excuse for overturning or modifying the scope and extent of the reserved power as settled by the long and uniform course of the prior decisions of this court heretofore cited in this opinion.

As stated in Attorney General v. Railroads, supra, we regard this power as one of great significance and gravity. We believe that when it was included in the constitution it was placed there for the purpose of reserving to the people of this state full power and control over corporations of its creation; that the purpose to be accomplished thereby was to reserve to the state those sovereign rights of which the states had been shorn by the decision in the Dartmouth College case, and that any construction which limits the scope of this power to a narrower field amounts to a judicial deprivation of sovereign rights which the people believed they had preserved to themselves by the terms of sec. 1, art. XI of the constitution.

This construction implies no denial of vested or property rights in valuable privileges granted to a corporation, essentially connected with its franchise and necessary to its business, which conduced to an acceptance of its charter and an organization under it. Such privileges are property. But in this state they are not unencumbered property. They are encumbered with the right of the state to alter or repeal them. The title of the grantee is necessarily a qualified title, because that is the only title the state can give. The constitutional provision under consideration deprives the legislature of the power of granting an unqualified right. The grantee takes them subject to this power of the state to alter or re-
193 peal. The corporation which invests its money in reliance upon such privileges does so in the faith that the power will not be unjustly or unreasonbly exercised. And here it may be said that the power is not one to be used for the purposes of spoliation or oppression. It is a power which the state is permitted to invoke only for the promotion and the protection of public interests. That is the purpose for which it was reserved. It is not to be used arbitrarily or capriciously or for the purpose of punishment or retaliation. That has been decided by this court. State ex rel. Northern Pacific Railway Company v. Railroad Commission, 140 Wis. 145; Water Power Cases, 148 Wis. 124. It is an instrument of justice, not a weapon of discipline.

The public utility law was enacted as a remedy for a well-recognized public evil. The relations existing between the respective municipalities and their public utilities were most unsatisfactory. The impotency of the municipalities to deal with them so as to secure adequate and satisfactory service for reasonable charges was abundantly demonstrated. The officers of the municipality lacked the training in the technique of the public utility business which was essential either to protect the interests of the citizens or deal justly with the public utility company. Whether the relations between

the municipality and the utility company were that of open war or supine acquiesce on the part of the city to the demands of the company, mattered little to the consumer. Unreasonable demands made by the city as a result of a lack of information concerning the public utility business were as fruitless of just results as meek submission to the ultimatums of the utility. The situation resulted neither in justice to the consumer nor stable business conditions to the utility.

194 So it was determined to take from the municipalities, which were not equipped to fix standards of services which might reasonably be demanded under the circumstances and determine reasonable rates therefor, the regulation and control of public utilities and vest that power with the railroad commission, which body, through its staff of experts, could acquire the information necessary to fix and enforce appropriate standards of service and just and reasonable rates which should adequately compensate the utility for the service rendered. The legislation has been welcomed by the public and the public utility companies alike. It has never been suggested that the purpose of the legislation was other than for the promotion of the public interests. That its effect was not to oppress the public service corporations is abundantly shown by the fact that during the four years (from 1907 to 1911) in which the law was elective, many, if not the great majority, of those corporations voluntarily surrendered their existing franchises and submitted to the provisions of the law. It is believed that fourteen years of experience has vindicated the law as a measure of great public benefit, although recently, when abnormal industrial and commercial conditions have given rise to a general increase in rates of service, mutterings against the law, or its administration, may be heard. But it should not be forgotten that successful regulation must be fearless and fair, and accommodated to the exigencies of changing conditions. Whenever the administrative agency appointed to arbitrate between the public and the utility is influenced by public sentiment rather than considerations of justice, the purpose of the law will fail, not because of its infirmities but because
195 of its weak and servile administration. Critics should appreciate that private capital devoted to public service is entitled to a fair return, and that it requires more courage and character to render just than popular decisions.

Conceding that the public interest required it, it was competent for the legislature to repeal the franchises of all public utility corporations. Greenwood v. Freight Co., 105 U. S. 13. This, however, it did not do. It simply substituted the powers and privileges of the public utility law for those of their existing franchises. It did not interfere with their right to occupy public streets or to continue in their respective businesses. The tenure of their respective franchises was made indeterminate instead of fixed and limited. Their regulation and control was vested with the railroad commission instead of the various municipalities. Truly this was a reasonable exercise of the reserved power, and was the initial step necessary to work the transition and carry out the legislative scheme.

A new franchise was therefore granted to the defendant in lieu of its original franchise by the enactment of ch. 596 Laws 1911. Thereafter its franchise was that of the indeterminate permit, and it was subject to the provisions of the public utility law. This also was its franchise on October 1, 1917, when it is claimed its original franchise expired. The public utility law had superseded everything of a franchise nature embodied in the original ordinance granted to it by the village of Superior and the subsequent and succeeding amendments thereto.

We now come to the very crux of this controversy. What is the effect of that law upon the provision found in the
196 original franchise-ordinance providing that "at the expiration of the said thirty years, should the said village refuse to grant to the said Superior Water Works Company, its successors and assigns, the right to continue and maintain said system of water works for another term of thirty years upon the same terms and conditions as may exist between the said village or city and the said Superior Water Works Company at the expiration of the first thirty years * * * then and in such case the village shall purchase from said Superior Water Works Company * * * said system of water works and the property connected therewith at a fair valuation, as provided in sec. 13"?

It is the contention of the respondent water company that this provision of the ordinance is a contract entered into by the city in its proprietary capacity and that it is not inherent in, not connected with, and forms no part of, the franchise emanating from the state to the water company for the use of the streets of that city. The city contends that the provision is an inherent and constituent part of the franchise and is subject to be altered or repealed by the legislature. We find it unnecessary to determine which of these contentions is right; because, even though it be considered as a contract, we think it gives rise to no obligation on the part of the city to purchase the plant according to its terms. The manifest purpose of the provision was to assure the water company one of two things: either a renewal of its franchise for another period of thirty years or a sale of its property in case such franchise be not renewed. The franchise called for was one having "the same terms and conditions as may exist between the said village or city and the said Superior Water Works Company at the expiration of the first thirty years."
197 The franchise which it had at that date was the indeterminate permit. That was either its franchise or it had none. That was a continuing franchise. It was indeterminate as to time. It was not limited to thirty years or any other period. Consequently there was no occasion for the city to "grant to the said Superior Water Works Company, its successors and assigns, the right to continue and maintain said system of water works." It already had that right. There was therefore no breach of this part of the alleged contract on the part of the city. Until there was a breach of this provision of the contract, no obligation on the part of the city to purchase according to the terms of the contract arose. It seems plain that the position of the water company is not helped by

construing this provision of the ordinance as a contract made by the city in its proprietary capacity. The conditions precedent to an obligation on the part of the city to buy under the terms of the contract have not come to pass, and the city has in no manner become obligated to carry out the feature of the contract which is sought to be enforced in this action.

"Furthermore, the very law which substituted the indeterminate permit for the original franchise of the water company authorized the city of Superior to acquire the property thereof by eminent domain, and in thus proceeding to acquire it the city is exercising the sovereignty of the state, which was not and could not be bartered away by a municipal ordinance, or in any other manner. It is a familiar rule that all property is held subject to the right of the state to acquire it for public purposes whenever it may see fit to do so." The power of eminent domain is a sovereign power, whether exercised by the state or by an agency to whom it may be delegated. The property of the water company was at all times subject to this power. The state could take it in pursuance of that
198 power at any time, and likewise it could authorize the city so to take it, and the exercise of the power was in no manner frustrated by the provisions found in the franchise-ordinance or in any of its amendments. The proceedings sought to be enjoined are in effect proceedings by the state to appropriate the property for just compensation, and its right and power so to do has not and cannot be suspended.

The law under which the city is proceeding to acquire the plant assures the water company adequate compensation for its property. We must assume that that is all that the water company will secure for its property if valued according to the provisions of the so-called contract. It is not alleged in the complaint that the method of valuation provided for by the public utility law will not afford the water company just compensation for its property, nor is it alleged that the valuation provided for in the ordinance will afford it more than just compensation. It is not alleged that it will be in any manner damaged if its property be valued in the way provided by the public utility law rather than in accordance with the terms of the alleged contract. If the method of valuation provided for in the ordinance is productive of unconscionable results and will result in an excessive valuation, then it should be considered whether a court of equity should, in the exercise of its discretion, invoke its power to decree a specific performance of the contract. However, we cannot assume such to be the case. We assume that either method will fix a just valuation upon the property, and that this controversy simply involves the question of which method shall be adopted in arriving at a just valuation of the property which the city seeks to take.

199 Our conclusion, therefore, is that the complaint states no cause of action and the demurrer thereto should have been sustained.

"We may say that we have not been hindered in arriving at our conclusion by that line of cases in the federal supreme court such as

Detroit v. Detroit Citizens' St. Ry. Co. 184 U. S. 368; City of Cleveland v. Cleveland City Ry. Co. 194 U. S. 517; City of Minneapolis v. Minneapolis St. Ry. Co. 215 U. S. 417, and other cases cited in respondent's brief. In those cases similar ordinances were held to be contracts as between the municipality and the public utility. This is in harmony with our own decisions. Ashland v. Wheeler, supra. In each of the cases cited the contest was between the municipality and the public utility, and the right of the state to alter or amend the corporate charters was not involved." In the leading case of Detroit v. Detroit Citizens' Ry. Co., supra, this question was specifically laid out of the case, at p. 397, where it is said: "The legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power to do so is not involved in the case." Nor was it involved in Detroit Railways v. Michigan, 242 U. S. 238. In that case it appeared that the legislature passed an act extending the city limits of the city of Detroit and the question was whether the street railways operating in the annexed territory could charge rates of fare provided by franchise granted to them by the town government, or whether, after the annexation, the city council of the city of Detroit had power to change the rates of fare prescribed in the original franchise. The court held that the rights of the railway company were fixed by the original franchise-ordinance granted by the town government, and
200 that its rights so fixed could not be impaired by the Michigan act enlarging the limits of the city of Detroit. There was no purpose on the part of the Michigan legislature to alter or amend the charter or franchise of the street railway company. Neither was that power invoked to justify its action. Its effect on the franchise of the street car company was incidental merely, and the question involved was whether, after the annexation, the street car company was subject to the regulation and control of the common council of the city of Detroit.

In concluding this opinion it is proper to say that had a different conclusion been reached upon the questions discussed it would have been necessary to consider whether the alleged contract could have been enforced against the city, in view of the fact that the state had withdrawn from the city the power to grant the franchise. It is a general rule of law that performance of contracts is excused when rendered impossible by act of law. 18 Mich. Law Rev. 602 and cases there cited. The legislature had rendered it impossible for the city to renew the franchise for a term of thirty years, or for any other term. Having deprived it of the power to grant the franchise, the question of whether its obligation, to buy the plant, which obligation is dependent upon its failure to grant the franchise, could be enforced, would require serious consideration. This case is very analogous to Macon Railroad Co. v. Gibson, 85 Ga. p. 1, where the performance of a contract was excused upon quite similar considerations.

By the Court: Order reversed and cause remanded with directions to sustain the demurrer to the complaint.

201 STATE OF WISCONSIN:

Supreme Court.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original opinion of the Court by Mr. Justice Owen, Jan. 11, 1921 and now on file in my office in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, the 14th day of July, A. D. 1921.

[Seal of the Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of the Supreme Court of Wisconsin.

[Endorsed:] State of Wisconsin, Supreme Court. Superior Water, Light & Power Company, Respondent, against City of Superior, et al., Appellants. Certified Copy of Opinion of the Court by Justice Owen.

202 STATE OF WISCONSIN:

In Supreme Court.

Filed March 11th, 1921.

No. 153, Jan. Cal., 1920.

SUPERIOR WATER, LIGHT & POWER COMPANY, Respondent,

vs.

CITY OF SUPERIOR, Appellant.

Upon a motion for rehearing made by respondent the attention of the court is called to the fact that the complaint in the action challenges the right of the city to acquire that portion of the property of the respondent Water Company located in the state of Minnesota, and while the question was neither urged nor presented upon the argument or in the briefs, the court is of the opinion that the best interests of the parties will be subserved by a decision upon the following:

Upon any proceedings heretofore taken, or upon any proceedings authorized by law, can the city acquire, under the provisions of the public utility law, or under condemnation proceedings, or in proceedings in the nature thereof, or in any manner, title to that portion of the property of the respondent Water Company located in the state of Minnesota?

It is ordered that a rehearing upon the specific question above stated, and none other, be, and is hereby, granted: the hearing thereof is set for Friday May 6, 1921.

To:

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" Grace, Fridley & Crawford,
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203 STATE OF WISCONSIN:

In Supreme Court.

No. 153.

SUPERIOR WATER, LIGHT & POWER COMPANY, Respondent,

vs.

CITY OF SUPERIOR et al., Appellants.

OWEN, *J.*:

Upon motion for rehearing, attention was called to the fact that the opinion of the court did not deal with the question whether the city could by proceedings in the nature of condemnation provided for by the public utility law, acquire that part of the Water Company's property located in the state of Minnesota, which issue was tendered by the pleadings though not dwelt upon in the briefs or the oral argument. Apprehension was expressed on the part of the respondent Water Company that the mandate of this court directing that the demurrer to the complaint be sustained amounted to res adjudicata upon this question, even though not dealt with in the opinion. The question thus raised is an important one, which would no doubt eventually call for the decision of this court, and while it would ordinarily reach this court on appeal from the order of the railroad commission, the court, believing that the interests of the parties would best be promoted by dealing with the question at the present time, to the end that further proceedings on the part of the city to acquire the water works plant should take a course in harmony with the view of this court concerning the power of the city
204 to condemn that portion of the plant, an order was entered granting a rehearing upon the following question:

"Upon any proceedings heretofore taken, or upon any proceedings authorized by law, can the City acquire, under the provisions of the Public Utility Law, or under condemnation proceedings, or in any proceedings in the nature thereof, or in any manner, title to that portion of the property of the respondent Water Company located in the state of Minnesota."

In response to that question the Water Company contends that the proceedings under which the city is attempting to secure title to the property of the Water Company are essentially proceedings in condemnation; that the city is not confining its efforts in such behalf to the taking of so much of the plant of the Water Company as is physically located in the state of Wisconsin, but that they extend to and include as well that portion of the plant physically located in the state of Minnesota; that the jurisdiction of this state to condemn property and thereby work a transition of title from the Water Company to the city does not extend to property located in the state of Minnesota, and that the city should be enjoined from any further efforts to secure title to that part of the plant having its physical location in the state of Minnesota, because of such lack of jurisdiction or power on the part of this state.

In the first place, it may as well be conceded that the proceedings under which the city is attempting to acquire title to the water works plant are condemnation proceedings. Although the public utility law provides (sec. 1797*m*-78) that any public utility voluntarily accepting an indeterminate permit shall be deemed to have consented to a future purchase of its property by the municipality in which the major part of it is situate for the compensation and under the terms and conditions determined by the commission, and shall thereby be deemed to have waived the right of requiring the necessity of
205 such taking to be established by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, and by subd. 4 of sec. 1797*m*-79 it is provided that any municipality shall have the power, subject to the provisions of the public utility law, to acquire by purchase as provided in the public utility law, the property of any public utility actually used and useful for the convenience of the public operating under any indeterminate permit, it was held in Connell v. Kaukauna, 164 Wis. 471 that proceedings on the part of a municipality to acquire the property of a water works company under the provisions of the law just referred to, were in the nature of condemnation proceedings. There is much greater reason for saying, and in fact there seems to be little room to doubt, that proceedings on the part of a municipality to acquire the property of a public utility company which has not voluntarily subjected itself to the provisions of the public utility act are in the nature of condemnation proceedings. In view of the ruling made in the Kaukauna case that such proceedings are in the nature of condemnation proceedings even where the public utility has voluntarily accepted an indeterminate permit, it would seem unnecessary to devote either time or space to demonstrate that the proceedings here in question are in fact in the nature of condemnation proceedings. Neither does there seem to be any room to doubt that this state is without any jurisdiction or authority to condemn property beyond its borders and over which it exercises no jurisdiction whatever.

The question with which we are confronted is whether that part of the water plant which reaches across the state line into the waters of Lake Superior, from which the supply of water is pumped for the use of the city, is in fact Wisconsin property. We freely concede

at the outset that that question must be answered in the affirmative in order to enable the city to proceed to continue the proceedings now instituted to a successful termination, and that unless the
206 question may be so answered the demurrer to the complaint should be overruled.

And right here perhaps a word descriptive of the plant is appropriate, if not necessary, to a thorough understanding of what follows. The city of Superior is located at the mouth of the St. Louis River, at which place the river widens out and has more the appearance and characteristics of a Bay than a river. This bay is commonly known as the Bay of Superior, and is about a mile in width. The opposite shore of this bay is formed by a narrow strip of land called Minnesota Point, and is a part of the state of Minnesota. In order to secure a supply of pure water from Lake Superior, the Water Company, pursuant to an agreement referred to in the main opinion, extended a main across the bay of Superior and across Minnesota Point, which is perhaps from 40 to 60 rods in width, and on out into the lake a sufficient distance to enable it to secure pure and wholesome water. It is that portion of this intake pipe, so-called, which extends beyond the boundary line between Wisconsin and Minnesota and across Minnesota Point into Lake Superior that is referred to as that portion of the plant lying in the state of Minnesota.

From this it will be seen that while this intake pipe is a very essential, it is, comparatively speaking, a small proportion of the entire property of the Water Company. It is, however, an integral part of the plant and inseparable therefrom; that is to say, its existence was deemed essential by both the Water Company and the city to enable the former to fulfill the obligation imposed upon it by its franchise of furnishing pure and wholesome water to the inhabitants of the city; that it always has been considered, and in fact is, an essential and integral part of the plant, is beyond doubt. A severance of this intake pipe from the plant at the boundary
207 line of the state would make junk of the pipe lying beyond, and necessitate some other expensive arrangement on the part of the company to procure a supply of wholesome water for the city.

The Water Company is a corporation organized under the laws of the state of Wisconsin. It has a franchise to operate a water works plant in the city of Superior derived from the state of Wisconsin. Every part and parcel of the property sought to be acquired by the city in the proceedings complained of is property devoted by the Water Company to the fulfillment of the duties laid upon it by its franchise. It is settled in this state that the franchise of a public utility corporation and the property devoted by it to the performance of the duties imposed upon it by the franchise, constitute an entirety, and the property, neither in its entirety nor in parcels, can be separated from the franchise, and that as the franchise is deemed the principal thing and is an incorporeal hereditament, the entire property assumes the character of personalty. The Yellow River Improvement Company v. Wood County, 21 Wis. 554; Chapman Valve Mfg. Co. v. Oconto Water Co. 89 Wis. 264; The Fond du Lac

Water Co. v. The City of Fond du Lac, 82 Wis. 322; The State ex rel. Milwaukee S. R. Co. v. Anderson, 90 Wis. 550; Town of Washburn v. Washburn Waterworks Co. 120 Wis. 575; Chicago & Northwestern Ry. Co. v. State, 128 Wis. 553. In the latter case, this principle was phrased in this way:

"This court has held that the franchise is the principal, the visible things the minor, part of an organized business machine, in a corporate organization, though the franchise is seen only through the physical part and its use; that the intangible part is personal property and draws to it, and so impresses the physical thing with its own character as to give to the whole the character of personalty."

It thus will be seen that the water plant is an entirety inseparable and indivisible. Its principal location is in this state. It is
208 owned by a corporation chartered in this state. It is devoted to a public use in this state, and to enable the corporation to discharge the duties assumed by it when it accepted its franchise granted by this state. It is assessed for purposes of taxation as an entirety under the laws of this state. Its value as an entirety is taken as a basis for rate-making purposes under the law of this state. It is difficult to conceive of property more clearly and definitely subjected to the jurisdiction of this state. Although a portion of it may be physically located beyond the borders of this state, nevertheless, it being deemed personal property, it has a legal situs in this state, and this is as true of any real estate or interest therein that the company may own to enable it to lay its pipe across Minnesota Point as it is with reference to any other part of the plant.

This state, therefore, has ample jurisdiction to deal with the entire property as property within this state and to take the title from the Water Company pursuant to its power of eminent domain. Should there be any difficulty in vesting the city with title to real estate on Minnesota Point, a court of equity has ample power to compel a conveyance on the part of the Water Company, which it would not hesitate to exercise in order to effectuate legislation enabling municipalities to acquire title to the public utilities rendering public service to and within such municipalities. It is well settled in this country that a court of one state may decree the foreclosure of a mortgage on property lying partly within the state of its jurisdiction and partly in another state, and direct a deed to the purchasers. Muller v. Dows, 94 U. S. 444; 24 Law Edition 207. See also note on jurisdiction of equity over suits affecting real property in another state or country in 69 L. R. A. 673. While in such cases the decree is based on the principle that a court of equity
09 having jurisdiction of the person may decree a conveyance by him of land in another state, and may enforce the decree by process, no reason is perceived why the same principle should not apply in a situation such as this. A court of equity of this state may acquire jurisdiction over the public utility. Should it be thought that some contractual relation between the state and the utility is necessary to justify the action, as of course is present in case of a mortgage foreclosure, that readily may be found in the franchise

granted by the state to the public utility, which in this case was amended pursuant to the reserved power of the legislature. The franchise of the Water Company, which enables it to pursue its business of supplying water to the city of Superior and its inhabitants, is a contract between it and the state. As amended by the legislature pursuant to the reserved power, that contract provides that its property may be acquired in the manner here attempted, and if necessary to carry out the legislative scheme a court of equity should not hesitate to compel the utility to execute conveyances to property the title to which cannot be affected by the condemnation proceedings outlined in the public utility law.

This view makes it unnecessary to consider many other objections made to the proceedings in the brief of the appellant Water Company.

It is contended that the proceeding is barred by numerous provisions of the federal constitution, such as Art. 1, sec. 10, prohibiting any state from passing laws impairing the oblgations of contract, and the 14th amendment prohibiting a state from denying to any person within its jurisdiction the equal protection of the law, and that it constitutes an unlawful interference with interstate commerce. We feel that so far as these objections merit attention, they are answered in what already has been said.

210 The question of the power of the city to acquire and own property beyond the state as well as city boundaries is considered in the briefs, though such power is not seriously doubted. In fact, the Water Company not only concedes but successfully contends that the city has such power. We think there can be no doubt of it. The city is authorized not only by its charter but by the public utility law to acquire, own and operate a water works plant. If the only available or practicable supply of pure and wholesome water for a boundary line city lies across the state boundary, the power granted generally to municipalities of this state to own and operate water works plants would be denied to our boundary line cities if they could not extend pipes and mains across the boundary line to such available water supply. That a city may acquire and own property, including real estate, beyond its borders to enable it to perform its municipal functions or powers expressly conferred upon it, was settled in this state by the case of Schneider v. Menasha, 118 Wis, 298, following the decided current of authority in this country, as will fully appear by the perusal of the opinion therein. The case of Becker v. The City of La Crosse, 99 Wis. 414 involved an exercise on the part of the city of La Crosse of governmental functions in the state of Minnesota, the authority to do which was of course denied. The exercise of municipal functions on the part of a municipality beyond its boundaries is an entirely different matter from the owning of real estate in its proprietary capacity so far as it may be necessary or convenient for the discharge of municipal powers and functions. Neither the law nor public policy of this state interferes with the acquirement by the city of Superior of that portion of the water works plant reaching beyond the boundary line of this state. Should the laws of the state of

Minnesota deprive a foreign municipality of the right to
211 acquire or own property, either real or personal, in the state of Minnesota, a further question would be presented. However, there is nothing before us to indicate that the city of Superior may not acquire and own any portion of this plant physically located in the state of Minnesota under the laws of that state. Upon this consideration of the further issue raised upon the motion for a rehearing we arrive at the conclusion that the demurrer to the complaint should have been sustained, and the mandate entered herein is correct.

212 STATE OF WISCONSIN:

Supreme Court.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original opinion of the Court on rehearing by Justice Owen, dated May 31, 1921 and on file in my office in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, the 14th day of July A. D. 1921.

[SEAL.] ARTHUR A. McLEOD,
Clerk of the Supreme Court of Wisconsin.

[Endorsed:] State of Wisconsin, Supreme Court. Superior Water, Light & Power Company, Respondent, against City of Superior et al., Appellants. Certified Copy of Opinion of the Court on Re-hearing by Justice Owen.

213–223 In Circuit Court, Douglas County, Wisconsin.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'HARE and Fred C. Tomlinson, as Councilmen of said City of Superior, Defendants.

The demurrer of the defendants to the complaint of the plaintiff in the above entitled action having been overruled in the circuit court, and appeal taken from the order overruling such demurrer, and the supreme court on such appeal having reversed such order and held that the demurrer should have been sustained and upon such opinion and order,

It is ordered, that the demurrer of the defendants to the complaint of the plaintiff be and the same is hereby sustained, and that the plaintiff shall have the right to serve an amended complaint within

twenty days from the time of the service of this order upon payment of ten dollars.

Dated this 22 day of July 1921.

JAMES WICKHAM,
Judge.

224–236 Circuit Court, Douglas County, Wisconsin.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'HARE and Fred C. Tomlinson, as Councilmen of said City of Superior, Defendants.

The above entitled action having been at issue and trial had on the demurrer of the defendants to the complaint of the plaintiff on the ground that the same did not state facts sufficient to constitute a cause of action and an order made and entered therein sustaining said demurrer on the order and decision of the supreme court of the state with right and leave of the plaintiff to amend its complaint therein by serving an amended complaint within twenty days thereafter, and more than twenty days having elapsed since the service of such order upon the plaintiff and no amended complaint or other pleading or proceeding having been served or taken by plaintiff and the said plaintiff being wholly in default therefor and proof of such facts having been duly made and filed herein:

Now therefore, it is ordered and adjudged that the said action be and the same is hereby dismissed and the defendant do have and recover of the plaintiff its costs and disbursements in said action taxed at the sum of $16.84.

Dated at Superior, Wis. this 26th day of Sept. 1921.

G. N. RISJORD,
Judge Circuit Court, Douglas Co., Wis.

237 & 238 And afterwards, to-wit, on the 11th day of April A. D. 1922, the same being the 24th day of the Term, the judgment of this court was rendered in words and figures following, that is to say:

Douglas Circuit Court.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'Hare and Fred C. Tomlinson, as Councilmen of said City of Superior, Respondents.

Opinion by Justice Jones.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Douglas County and was argued by counsel, on consideration whereof it is now here ordered and adjudged by this Court that the judgment of the Circuit Court of Douglas County, in this cause, be, and the same is hereby affirmed with costs against said appellant taxed at the sum of Thirty-four and No/100 dollars ($34.00).

Crownhart J. took no part.

239 In Supreme Court, State of Wisconsin.

No. 3, January Calendar 1922.

SUPERIOR WATER, LIGHT & POWER COMPANY, Appellant,

vs.

CITY OF SUPERIOR et al., Respondents.

Appeal from a Judgment of the Circuit Court for Douglas County.

G. N. Risjord, Circuit Judge.

Affirmed.

JONES, *J.*:

On October 8, 1918, the council of the city of Superior passed a resolution declaring the intention of the city to take over the property of the Superior Water, Light & Power Company in accordance with the Public Utility Law. Thereupon the company brought suit to enjoin the city from so doing. From an order overruling a demurrer to the complaint the city appealed to this court. The court reversed the order overruling the demurrer and remanded the case with directions to sustain the demurrer. — Wis. —, 181 N. W. 113. Plaintiff filed a motion for a rehearing, which was ordered on one of the questions involved. A reargument was had, and thereafter, on May 31, 1921, the court rendered a decision sustaining its previous mandate. — Wis. —, 183 N. W. 254. Upon the remanding of the record, the circuit court entered an order sustaining the demurrer,

within leave to amend the complaint within twenty days. The plaintiff not pleading over, final judgment was entered sustaining the demurrer and dismissing the complaint. The present appeal is made from this judgment.

From an examination of the record it appears that the proceedings in the court below were regular and in accordance with the proper practice, and the judgment as entered should be affirmed.

By the Court: Judgment affirmed.

240 STATE OF WISCONSIN:

In Supreme Court.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff in Error,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'Hare and Fred C. Tomlinson, as Councilmen of said City of Superior, Defendants in Error.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause.

That the original writ of error, the petition therefor and order allowing the same, the assignment of errors, the citation, certificate of lodgment and a copy of the bond are appended to the return herein, and that they are all returned tc the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 13th day of June, A. D. 1922.

[Seal of Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of Supreme Court, Wisconsin.

241 Supreme Court of Wisconsin.

SUPERIOR WATER, LIGHT & POWER COMPANY, Plaintiff in Error,

vs.

CITY OF SUPERIOR and F. A. BAXTER, as Mayor, and C. N. O'Hare and Fred C. Tomlinson, as Councilmen of said City of Superior, Defendants in Error.

Stipulation.

It is hereby stipulated and agreed by and between the above named parties, through their respective attorneys, that in order to save ex-

pense in the printing of the record herein, the following portions of the record, the same being sufficient to show the alleged errors complained of, shall be printed and no more, to-wit:

1. Amended and supplemental complaint, verified January 27, 1919, and following exhibits attached thereto: (Pages 73 to 83 of transcript.)

(*a*) Exhibit A, being ordinance No. 1, except that part of Section XII which embraces table of yearly water rates, in substitution of which table shall be printed a recital that the same is omitted as immaterial. (Pages 85 to 100 of transcript.)

(*b*) Exhibit B, being Ordinance No. 5. (Pages 100 to 103 of transcript.

(*c*) Exhibit C, being Ordinance No. 36. (Pages 103 to 107 of transcript.

(*d*) Exhibit D, being conveyance from Superior Water Works Company to Superior Water, Light & Power Company, of date November 1, 1889. (Pages 107 to 113 of transcript.)

242 (*e*) Exhibit E, being Ordinance No. 38. (Pages 113 to 116 of transcript.)

(*f*) Exhibit F, being Ordinance No. 311. (Pages 116 to 118 of transcript.)

(*g*) Exhibit G, being Ordinance No. 374. (Pages 118 to 125 of transcript.)

(*h*) Exhibit H, being Ordinance declaring intention of City to acquire property of Company. (Pages 125 to 127 of transcript.)

(*i*) Exhibit I, being Notice of Election of date October 9, 1918. (Page 127 of transcript.)

2. Demurrer to amended and supplemental complaint. (Page 129 of transcript.)

3. Order of Circuit Court overruling demurrer of date December 24, 1919. (Page 144 of transcript.)

4. Opinion of Supreme Court of Wisconsin rendered January 11, 1921. (Pages 166 to 200 of transcript.)

5. Order of Supreme Court of Wisconsin granting motion for rehearing upon certain designated questions. (Page 202 of transcript.)

6. Opinion of Supreme Court of Wisconsin on rehearing rendered May 31, 1921. (Pages 203 to 211 of transcript.)

7. Mandate of Supreme Court of Wisconsin reversing order of Circuit Court and remanding cause with directions to sustain demurrer. (Page 162 of transcript.)

8. Order of Circuit Court sustaining demurrer and granting leave to amend, of date July 22, 1921. (Page 213 of transcript.)

9. Judgment of Circuit Court of date September 26, 1921. (Page 224 of transcript.)

10. Opinion and judgment of Supreme Court of Wisconsin on appeal from judgment last mentioned. (Page 239 of transcript.)

243 11. Petition for writ of error. (Pages 1 to 4 of transcript.)

12. Assignment of errors. (Pages 6 to 8 of transcript.)

13. Certificate of Clerk of Supreme Court to transcript. (Page 240 of transcript.)

14. The titles of the cause, and verifications, embodied in the above documents to be printed, shall be omitted wherever the printing thereof is unnecessary.

15. This stipulation as to the parts of the record which are to be printed.

It is further stipulated that if from oversight or omission any necessary part of the record be not thus printed, that the plaintiff in error has the right to print or may be required by the defendants in error to print any other or additional portions thereof. Dated June 5th, 1922.

GRACE, WESLEY & CRAWFORD AND
H. L. BUTLER,
Attorneys for Plaintiff in Error.
T. L. McINTOSH,
C. M. WILSON,
City Attorneys of City of Superior, and
——— ———,
Attorneys for Defendants in Error.

244 [Endorsed:] 436—28986. Supreme Court of Wisconsin. Superior Water, Light & Power Company, Plaintiff in Error, vs. City of Superior, et al., Defendants in Error. Stipulation. Original.

245 [Endorsed:] File No. 28986. Supreme Court U. S., October Term, 1921. Term No. 436. Superior Water, Light & Power Co., P. E., vs. City of Superior et al. Stipulation as to parts of record to be printed. Filed June 15, 1922.

Endorsed on cover: File No. 28,986. Wisconsin Supreme Court. Term No. 436. Superior Water, Light & Power Company, plaintiff in error, vs. City of Superior and F. A. Baxter, as Mayor, et al., &c. Filed June 16th, 1922. File No. 28,986.

SUBJECT INDEX

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SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 436

SUPERIOR WATER, LIGHT & POWER COMPANY,
Plaintiff in Error,

vs.

CITY OF SUPERIOR AND F. A. BAXTER, AS MAYOR, ET AL.

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

The writ of error brings here for review the final judgment of the Supreme Court of Wisconsin affirming the final judgment of the Circuit Court for Douglas County which dismissed the action because the complaint failed to state a cause of action. (Tr. p. 70-72)

The suit was brought to restrain the City of Superior and its officials from proceeding to condemn the waterworks property of the Company, located in part in the city of Superior, Wisconsin, and in part in the State of Minnesota, and to require the City to purchase the property in accordance with the terms of a contract of purchase entered into between the parties prior to the adoption of the Wisconsin law under which the condemnation proceedings were instituted.

The contract which was impaired.

On October 15, 1887, the village of Superior adopted an ordinance (known as ordinance No. 1) granting to Superior Waterworks Company a thirty-year waterworks franchise.

It was expressly provided in the franchise that the main source of supply should be the Bay of Superior, with filtration; but it was further provided that if the village, at its own expense, should procure for the Company a right of way across the bay and across Minnesota Point to Lake Superior, the supply should be taken from the lake instead of from the bay. Minnesota Point is a narrow projection of land constituting a part of the state of Minnesota, and located across the bay and about a mile from the city of Superior in Wisconsin. (Sec. 2 of Ordinance, Tr. p. 16)

The village (in addition to reserving the right of purchase at prescribed intervals during the life of the franchise) expressly obligated itself to purchase the plant at the end of the franchise term (thirty years) at an appraised valuation, unless at that time it should renew the franchise for a like period upon the same franchise terms and conditions as those which should exist between the parties at the expiration of the original franchise. (Sec. 1 of Ordinance, Tr. p. 15; Sec. 13, Tr. p. 21)

The franchise provided for acceptance by the Company (which was done) and expressly provided that "from and after the filing of said acceptance this ordinance *shall have the effect of and be a contract* between the village of Superior and the Superior Waterworks Company *and shall be the measure of the rights and liabilities of said village as well as of said Company.*" (Tr. p. 22)

The plant was fully completed and placed in operation, in accordance with the contract. (Tr. p. 8) Meanwhile the village was incorporated as a city, under a charter which provided that:

> "All franchises heretofore granted, or contracts entered into by the village of Superior shall continue and remain in force in accordance with the terms thereof, as if the same had been granted and entered into by said city of Superior." (Sec. 234, Chap. 152, Laws of 1889)

Thereafter, and on October 1, 1889, was entered into the contract here in question, the same being effected by way of an accepted amendment of the original ordinance. (Tr. p. 9)

By this contract the city, in consideration of the undertaking of the Company to obtain at its own expense (instead of at the expense of the city) the right of way across the bay and across Minnesota Point, and to make the installation required to obtain the water supply from the lake (instead of from the bay), agreed that in case the city should decline to renew at the end of the thirty-year term *the purchase price should be measured by the capitalization at five per cent of the net earnings for the year preceding the purchase.* The absolute obligation to purchase in default of renewal provided for in Sec. 1 of the original ordinance was preserved, but the basis was thus expressly changed from the appraisal basis originally provided for to the earning basis. (Tr. p. 26, 27)

The amending ordinance provided for acceptance by the Company (which was done) and it was expressly provided therein that the previous ordinance, as so amended and modified, *"shall be and become and is hereby made a binding contract."*

The amending ordinance is known as ordinance No.

36, and will be referred to herein as the purchase contract.

Thereafter, and on November 1, 1889, the present company duly acquired all the property, rights and franchises of Superior Waterworks Company, and assumed all the obligations of the latter company. (Tr. p. 9)

Relying upon the original and amending ordinances as constituting lawful and valid contracts, and especially relying upon the obligations assumed by the city under the latter, plaintiff fully executed the provisions of such ordinance. It procured the rights of way for and extended its mains across the bay and across the Point, acquired the necessary land on the Point, installed an intake pipe extending a long distance into the lake, and installed a system of wells, machinery and equipment, at a cost exceeding $140,000.00, and thereby made available to the city the lake source of supply, (with filtration as before, though the lower court erroneously assumed otherwise) which it would not otherwise have had, and which it has ever since enjoyed. Plaintiff has since expended around one million dollars in extending and improving its system, all in reliance upon the performance by the City of its contractual obligations. (Tr. p. 9-10)

The contract was made under clear and express legislative authority.

This is not denied either by the court below or by defendants. On the contrary, it is in substance conceded. As will be later noted, the authority was conferred by the charter of the City, the charter of the Company, and by the general statutes of the State, all of which conferred upon the parties the clear and unequivocal right *to contract* upon such terms and conditions as should be agreed

upon, and clearly imported that any contract entered into should be binding upon the parties and be the measure of their rights and liabilities.

The breach of the contract by the city.

Upon request to the municipal authorities that they determine whether the city would purchase the property or would exercise its election to renew, the contract obligations were denied, and the city instituted proceedings to condemn the property under the assumed authority of the public utility statutes of Wisconsin, and in repudiation of the purchase contract. (Tr. pp. 11, 12)

The Wisconsin statutes which impair the contract.

In 1907 the legislature adopted 1797m—1 to 1797m—109 Wisconsin Statutes, which created a regulatory body designated as Railroad Commission of Wisconsin, and vesting in it the authority to regulate the rates and service of public utilities. As originally enacted, the statutes gave to public utilities an option to surrender their existing municipal franchises and accept in lieu thereof what is designated as an indeterminate permit. Such voluntary acceptance of an indeterminate permit operated under the statutes as an agreement by the utility that the municipality might take its property for such just compensation as the Railroad Commission, after hearing, should determine, and upon such terms of purchase as it should prescribe. (Secs. 1797m—76, 1797m—78, 1797m—82 Wis. Stats.)

Plaintiff never surrendered its former franchise or contract rights, under these statutes, or otherwise. (Tr. p. 10)

In 1911 the legislature amended the statutes by pro-

viding that every franchise granted prior to the adoption of the public utility law "is so altered and amended" as to constitute an indeterminate permit within the meaning of that law, and as to subject the property of the utility to condemnation by the municipality upon such just compensation and terms of purchase as should be determined by the Railroad Commission. (Sec. 1797m—77 Wis. Stats.)

Judicial review of the findings of the Commission is also provided for. (Sec. 1797m—83-86)

The decision of the court below.

It was in substance conceded by the court below that the ordinance contract, including the purchase provisions of Ordinance 36, were made under ample legislative authority, and that, apart from the reserved power to amend corporate charters, the contract would not be subject to impairment by subsequent legislation.

The decision of the court was rested on the following grounds:

1. That it was within the power of the legislature, under the reserve clause of the State Constitution, to convert the original thirty year franchise into an indeterminate franchise or permit.

2. That the subsequent legislation should be construed as effecting such substitution of the indeterminate franchise, and as giving to the Company a franchise as good as or better than than would have resulted from the renewal of its original franchise, and, hence, that there was no breach of the contract to purchase in default of renewal.

3. That no unlawful impairment of the contract of purchase could arise from subsequent legislation for the condemnation of the property, even though such condem-

nation were in repudiation of, rather than in subordination to, the contract rights of the Company.

4. That because it was the established doctrine of the Wisconsin courts that a public utility franchise is personal property, and is the principal thing, the physical property being merely the incident, the situs of the Minnesota land and property of the Company was that of its Wisconsin owner, and, hence, such foreign land and property was to be regarded as *in fact* within the territorial sovereignty of Wisconsin, and subject to condemnation under the subsequent legislation here in question.

The Federal questions presented by the writ of error.

There are numerous assignments of error (Tr. pp. 3-5), but for the purposes of this motion they may be summarized as follows:

(1) The statutes of the state, as construed and applied by the court, impair the purchase contract embraced in the accepted ordinance No. 36, in contravention of the contract clause; and subject the property of plaintiff to condemnation in derogation of such contract, and in contravention of the fourteenth amendment.

(2) The statutes of the state, as construed and applied by the court, subject the Minnesota real estate of plaintiff to condemnation in Wisconsin, in contravention of the fourteenth amendment.

(3) The statutes of the state, as construed and applied by the court, subject to condemnation property beyond the sovereignty of the state, which is embarked in, and is an instrumentality of, interstate commerce, in contravention of the commerce clause.

Both the motion to dismiss and the brief for defendants in support of it ignore the real issues here involved.

The motion to dismiss is not rested on the ground that there is no federal question here involved, but only on the ground that there are "no *unsettled* federal questions or constitutional questions involved." (Brief for defendants, p. 43)

As to the brief in support of the motion, it ignores the real questions here presented. It appears to indulge throughout the following erroneous assumptions:

1. That a reserved power to alter or repeal corporate charters justifies the destruction of valuable contractual and property rights acquired *under* and by virtue of admitted corporate and municipal powers of a proprietary nature.

2. That because the sovereign power of eminent domain cannot be contracted away, the state may authorize its exercise in derogation and repudiation of pre-existing contractual and property rights.

3. That because the City has the power to acquire by *purchase* the Minnesota land and property of the Company, the legislature may confer upon it the sovereign power of *eminent domain* over property *in fact* beyond the territorial sovereignty of the state.

These assumptions are indulged without the citation of any authority even tending to support them.

A motion to dismiss will be denied unless "it plainly appears that the federal question is of such an unsubstantial character as to cause it to be devoid of all merit and therefore frivolous."

Deming v. Carlisle Packing Co., 226 U. S., 102, 105.
Mobile Transportation Co. v. Mobile 187 U. S., 482.
Swafford v. Templeton, 185 U. S., 487, 493.

In view of this rule it would be natural to expect that the brief for defendants would designate the particular decisions of this court which are claimed to rule the present case. So far as the brief discloses, there are specified but two authorities of alleged controlling significance, namely:

Pennsylvania Hospital v. Philadelphia, 245 U. S., 20.

Long Island Water Supply Co. v. City of Brooklyn 166 U. S., 685. (Brief of City, p. 31)

These cases tend to defeat rather than support defendants' contention. Their citation as of controlling importance evidences misconception of the real questions here involved. In the first of them (245 U. S. 20) which apparently prompted this motion, the legislature had expressly abdicated the power of eminent domain in the very legislation which was relied upon as a contract and, moreover, the condemnation was in recognition of the contract. In the case at bar there is involved no attempted abdication of the power of eminent domain. The question here is whether the power must be exercised in recognition of and subordination to property rights rather than in repudiation of them.

The distinction is well indicated in the other of the cases particularly relied on by defendants (166 U. S., 685), wherein the ruling is directly against the present contention of defendants.

The foregoing considerations might well justify the denial of the present motion.

In view of the importance of the case, however, the following argument and authorities are submitted. Italics throughout are our own unless otherwise indicated.

ARGUMENT

I.

THE PURCHASE CONTRACT WAS MADE IN PURSUANCE OF EXPRESS LEGISLATIVE AUTHORITY, DID NOT INVOLVE FRANCHISE RIGHTS OR PRIVILEGES OF A GOVERNMENTAL NATURE, AND IS AS IMMUNE FROM SUBSEQUENT IMPAIRMENT AS ANY OTHER LAWFUL CONTRACT.

That the contract was made upon clear and express legislative authority is in substance conceded both by the court below and by defendants.

That it was made in pursuance of the proprietary rather than the governmental powers of the City is admitted by defendants, and is not denied by the court below.

It is also in substance conceded both by the court below and by defendants that, apart from the reserved power, the contract was not subject to impairment by subsequent legislation. The authorities fully establish these propositions.

The legislative authority to enter into the contract was clear and express.

This is, in substance, admitted by defendants, who say in their brief (p. 7):

> "• • • so it was proper for the parties to this franchise to make a contract provision of the character contained in the franchise, which would be operative until the legislature took action under such reserve power, • • •".

The authority is embraced in the charter granted to Superior Waterworks Company (Tr. p. 6-7), in the gen-

eral statutes of the State (Sec. 1780 R. S. 1878, as amended by Chapter 211, Laws of 1879, which became 1780a Wis. Stats.), and in the charter granted to the City of Superior (Tr. p. 7-9). The material provisions of these statutes are set out in the appendix hereto.

These statutory provisions show that the purchase contract was made in the presence of the express charter authority of the City "to provide for the purchase, construction, maintenance and operation of waterworks;" also in the presence of the broadest power to *contract* with respect to all matters (even as to rates) relating to water supply and waterworks; and that *the legislation expressly contemplated that such contracts should be inviolable.*

The authority thus granted was distinctly one to *contract,* upon terms and conditions to be agreed upon, as distinguished from mere authority to *prescribe* or *determine* conditions or like language implying *regulatory,* rather than *contractual,* authority.

Vicksburg v. Vicksburg Waterworks Co., 206 U. S., 496, 508, 515, 516.

Cleveland v. Cleveland Co., 194 U. S., 517, 534.

Detroit v. Detroit Co., 184 U. S., 368, 388, 389.

Home Tel. Co. v. Los Angeles, 211 U. S., 265, 276.

Walla Walla v. Walla Walla Co., 172 U. S., 1, 9, 14.

Detroit United Rys. v. Michigan, 242 U. S., 238, 245.

This distinguishes cases wherein the legislative authority was of a regulatory, rather than contractual, nature.

Milwaukee Co. v. R. R. Comm., 238 U. S., 174, 184.

It may be said here, as was said in *Detroit United Rys. v. Michigan,* above, (242 U. S., 238, 248):

> "Not only is it not disputed, but it is not open to serious dispute, that the original village and township grants were *contractual in their nature.* * * *
> It is plain, as was pointed out by this court in *Detroit v. Detroit Co.,* 184 U. S., 368, 385, that the legislature regarded the fixing of the rate of fare as a *subject for agreement between the municipality and the company.* And in these cases, as in that, the terms of the several ordinances are such *as clearly to import a purpose to contract under the legislative authority thus conferred.*"

The purchase contract was made in the exercise of the proprietary powers of the city and was not a part of or inherent in the original franchise.

By the original ordinance, the city, under ample legislative authority, had granted to the original Company the right to construct and operate the plant and system, under prescribed rates of charge, for the term of thirty years, and had obligated itself to purchase the plant, upon an appraisal basis, at the end of the term in case it should not renew the franchise upon the agreed conditions existing at the time of termination. The plant had been constructed and was in operation in accordance with this accepted franchise. About two years later, and again under ample legislative authority, the purchase contract was made, *in form* by an accepted amendment to the original ordinance, but *in fact* by a wholly separate and independent contract. By its terms, the city said to the company, if you will undertake to get a water supply direct from the lake, and incur the large investment in Minnesota rights of way and land, and in equipment requisite to such supply, the city will purchase the entire

plant and system at the end of the thirty years, not on the previously agreed appraisal basis, but at a fixed price,—not fixed in dollars, but determinable by mere mathematical calculation, and on a basis considered by the parties as sufficiently liberal to justify the increased investment. The company agreed. The city thus obtained and has ever since enjoyed the fruits of the bargain.

The contract thus effected was one to purchase the property in the event that the original franchise was not extended. It did not attempt to bind future action of the city with respect to rates, or with respect to the streets or public matters subject to governmental control. Matters involving the use of the streets, rates, etc. had been covered by the original ordinance previously adopted and accepted. From these special rights or privileges—franchise rights—the contract in question was wholly distinct. It was in no wise inherent in the franchise. This is demonstrated by the fact that the contract—the obligation to purchase on the designated basis—was to be performed only on the termination of the existing franchise. It could not inhere in such franchise, or have anything to do with the exercise of public rights or privileges therein provided for because its performance involved the *termination* of such rights and privileges.

In Wisconsin as elsewhere the distinction is well established "between the nature and scope of the state agency authority in granting public franchises and the granted business capacity of a municipality or other corporation to make contracts as a private person might, within the scope of the municipal power to contract."

La Crosse v. La Crosse G. & E. Co., 145 Wis. 408, 419.

Contractual features inhering in special privileges granted by the state through municipal agency, i. e. franchise rights, are differentiated from contracts made by a municipality in the exercise of its proprietary powers. Compare

La Crosse v. La Crosse G. & E. Co., 145 Wis. 408, 417-419.

Superior v. Douglas County, 141 Wis. 363.

It is likewise settled doctrine that in providing a water supply for its inhabitants a city acts in a proprietary, or private business capacity, rather than in a governmental capacity.

State Journal Printing Co. v. Madison, 148 Wis. 396.

Wisconsin Traction Co. v. Menasha, 157 Wis. 1.

Evans v. Sheboygan, 153 Wis. 287, 289.

Mulcairns v. Janesville, 67 Wis. 24.

Nemet v. Kenosha, 169 Wis. 379, 383.

Eau Claire Dells Improvement Co. v. Eau Claire, 172 Wis. 240, 252.

Omaha Water Co. v. Omaha, 147 Fed. 1, 6 (C.C.A.)

And the rights and liabilities of a municipality are judged in this proprietary aspect of its power, even though waterworks are also used for the public purpose of protection from fires.

Piper v. Madison, 140 Wis. 311.

(It may be noted in passing that in the instant case fire protection had nothing to do with the contract in question, since water from the bay would have been as good for that purpose as the lake supply.)

Indeed, the Wisconsin court has held that where a city

was authorized to construct a dam for the purpose of obtaining power to operate waterworks, and to dispose of the excess power produced by the dam, it could, in the exercise of its proprietary powers, "and wholly irrespective of direct legislative authority", contract with another to build the dam and in part consideration thereof lease the dam to such other for a period of ninety-nine years reserving the required power for its waterworks. As regards the asserted improvidence of such a municipal contract, the court declared that "it is deemed competent for a municipality (in the exercise of its proprietary powers) as well as for a private *individual* to make a valid improvident contract."

Eau Claire Dells Improvement Co. v. Eau Claire, 172 Wis., 240, 252-254.

The wisdom of entering into the contract involved essentially a matter of business judgment. The fact that without the agreement to purchase on the earning basis it would not have been practicable for the city to obtain a lake supply, and that the obtaining of it put the Company to large expense, were important factors in the exercise of the judgment which the making of the contract involved. The wisdom of the action is not a judicial question. As stated by the Wisconsin court:

> "It comes down in each case to the exercise of mere human judgment. That being the case, there must necessarily be a wide range within which municipal officers, acting in good faith, may go, and not be guilty of such an abuse of power as to render their acts, as acts of the city, void. As suggested in the New York case, they may go to the point where to go further would indicate some ulterior motive—indicate that a legitimate city purpose was no longer in view. That would be true whether the act done

were performed within or without the corporate limits."

Schneider v. Menasha, 118 Wis., 298, 305, 306.
Milwaukee v. Raulf, 164 Wis., 172, 180.
Vicksburg v. Vicksburg Water Co., 206 U. S., 496, 515.

That the acquisition of a water supply by a municipality distinctly involves the exercise of its proprietary or business powers, (not only in Wisconsin but elsewhere), is not only conceded but is strenuously urged by the defendants on the present motion. Counsel insist, indeed, that "in their business matters municipal corporations are governed by much the same rules as private concerns", and that "in exercising its proprietary functions a city stands in the same position and exercises its functions in the same manner as a private corporation or *individual.*" (See brief for City, p. 35-37)

Moreover, the court below, in meeting the contention of the Company that the land in Minnesota was not subject to condemnation under Wisconsin statutes, found it necessary (on the rehearing) to differentiate between the governmental and proprietary or business powers of a municipality, and to place within the latter category the acquisition of a water supply. (Tr. p. 68)

The obligation to purchase in default of renewal constituted a valid and enforceable contract as immune from interference as any private contract.

The contract having thus been made upon a lawful consideration, and in the exercise of the proprietary powers of the City, and under ample delegated authority, and involving no question of surrender of governmental powers, stands on the same basis, as regards impairment

by future legislative action, as any other lawful contract. Such a contract is as inviolable as would have been the contract of the City to purchase a parcel of real estate from the Company or as would be a contract between private individuals.

It may be added that apart from the reserved power, neither the court below nor the defendants claim otherwise.

Similar contracts have come before the courts, have been repeatedly upheld and their performance specifically decreed.

City & County of Denver v. N. Y. Trust Co., 187 Fed. 896 (C. C. A.)

National Waterworks v. Kansas City, 62 Fed. 853 (C. C. A., Opinion by Brewer, Circuit Justice)

Ashland Waterworks Co. v. Ashland, 251 Fed. 492 (C. C. A.)

Benjamin v. Mayfield, 170 Ky. 446, 186 S. W. 169.

Slade v. Lexington, 141 Ky. 241; 132 S. W. 404.

Cherryvale Water Co. v. Cherryvale, 69 Pac. 176, (Kans.)

Braintree v. Braintree, 16 N. E. 420, 425, (Mass.)

Bristol v. Bristol Waterworks, 34 Atl. 359; 32 L.R.A. 704, (R. I.)

City of Bremerton v. Bremerton Co., 153 Pac. 372, 376.

A city cannot be heard to say that by reason of subsequent change of conditions or otherwise it should not be required to purchase.

City of Moorhead v. Union L. H. & P. Co., 255 Fed. 920.

The case of *Denver v. N. Y. Trust Co.*, (292 U. S. 123, 137, 138,) came to this court, and the decision below was

reversed, but only upon the ground that the contract in question should be construed as giving to the city independent options both as to renewal and as to purchase, not obligating it to do either.

II.

EVEN THOUGH THE PURCHASE CONTRACT WERE TREATED AS A PART OF AND INHERENT IN THE FRANCHISE, AND AS INVOLVING THE GOVERNMENTAL POWERS OF THE CITY, IT IS NEVERTHELESS PROTECTED FROM IMPAIRMENT.

Inasmuch as Ordinance 36 and its acceptance constituted a separate contract, made under ample legislative authority, and in the exercise of the business, rather than the governmental powers of the City, we do not necessarily confront the above proposition.

But the authorities leave no question that the accepted ordinances constituted inviolable contracts in *all* their provisions, even those of such distinctively franchise character as the use of streets and the rates of charge.

Accepted franchises to construct and maintain public utilities confer valuable property rights.

Boise Water Co. v. Boise City, 230 U. S. 84, 90.
Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 65.
Covington v. South Covington Street Ry. Co., 246 U. S. 416, 418.

If made with clear legislative authority (as is admittedly the case here), they constitute contracts which are protected from subsequent impairment even as to such distinctively public matters as rates of charge.

Home Tel. Co. v. Los Angeles, 211 U. S. 265, 273.

Detroit v. Detroit Etc., Ry. Co., 184 U. S. 368.
Cleveland v. Cleveland City Ry., 194 U. S. 517; 201 U. S. 529.
Minneapolis v. Minneapolis Ry. Co. 215 U. S. 417, 436, 437.
Vicksburg v. Vicksburg Water Co., 206 U. S. 496.
City Ry. Co. v. Citizens' Ry. Co., 166 U. S. 557.
Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 9.
City of Moorhead v. Union L. H. & P. Co., 255 Fed. 920, 922.
Columbus Ry. Co. v. Columbus, 253 Fed. 499, 503.

Such is also the established doctrine of the Wisconsin Supreme Court.

Manitowoc v. Manitowoc & N. T. Co., 145 Wis. 13, 27.
Duluth Street Ry. Co. v. R. R. Comm., 161 Wis. 245, 254.

The principle is not modified by the decisions in

Milwaukee E. R. & L. Co. v. R. R. Comm., 153 Wis. 592; affirmed in
Milwaukee E. Ry. Co. v. Wis. R. R. Comm., 238 U. S. 174.

These latter cases went on the ground that legislative authority was lacking.

Columbus R. P. & L. Co. v. Columbus, 253 Fed. 499, 504.

Nor by such decisions as,

Minneapolis Etc., Ry. Co. v. Menasha Co., 159 Wis. 130, 136.
Georgia Etc., Co. v. Smith, 128 U. S. 174.
Armour Co. v. U. S., 209 U. S. 56.

Louisville, Etc. Co. v. Mottley, 219 U. S. 467.
Portland Etc. Co. v. R. R. Comm., 229 U. S. 397.
Seaman v. M. & R. R. Co., 149 N. W. 134 (Minn.)

These cases are distinguished by the character of the statutory power. They go upon the ground that general legislative authority to a *carrier* to *itself* prescribe rates is not to be construed as a surrender of state power of regulation. They in no way impair the rule that if the state directly, or through a municipality to which it has delegated the power, makes a contract which suspends its control over rates, such contract will be inviolable during the period of the suspension. The distinction is well indicated in,

Georgia, Etc. Co. v. Smith, 128 U. S. 174, 182.
Detroit v. Detroit Ry. Co., 184 U. S. 368, 388.
Southern Pacific Co. v. Campbell, 230 U. S. 537, 551.
Duluth v. Street Ry. Co., 161 Wis. 245, 253.

The rule that a franchise contract, entered into upon clear legislative authority (as is admittedly the case here) is protected from impairment by the contract clause of the Federal constitution, is apparently conceded by the court below; though the opinion suggests a possible distinction where the subsequently impairing act is that of the state itself rather than of the municipality which granted the franchise. That there is nothing in this suggested distinction is apparent from the language of the contract clause itself, which prohibits any *state* (directly or through state agency) from passing any law impairing the obligation of contracts. That the contract clause is as effectively contravened by direct state action as by

the subsequent action of the municipality which made the contract, has been expressly held.

Detroit Rys. Co. v. Michigan, 242 U. S. 238.

Puget Sound Traction Co. v. Reynolds, 244 U. S. 574.

III.

THE RESERVE CLAUSE OF THE WISCONSIN CONSTITUTION HAS NO APPLICATION TO THE CONTRACT IN QUESTION.

It has been seen that both the original and amending ordinances were adopted, accepted and executed by the Company under ample contractual powers, and that they conferred upon the Company *property rights*, and that they were not subject to future impairment even as to such public features as the rates of charge,—much less as to the obligation to purchase at the end of the franchise term.

To what extent if at all does the reserve clause affect the situation?

This court determines for itself the scope of the reserve clause.

The court has recently declared:

> "But, notwithstanding what was there said (in other cases) it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? And

(3) has that obligation been impaired by subsequent legislation?"

Detroit United Ry. v. Mich., 242 U. S., 238, 249.

Milwaukee E. R. & L. Co. v. State of Wis., 252 U. S., 100, 103.

The reserve clause and other provisions to be read in connection therewith.

The reserve clause (Sec. 1, Art. XI Wis. Const.) provides:

> "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

The Wisconsin constitution contains the further provisions;

> "No * * * law impairing the obligation of contracts shall ever be passed. * * *" (Sec. 12, Art. I)
>
> "The property of no person shall be taken for public use without just compensation therefor." (Sec. 13, Art. I)

The reserve clause should be interpreted in the light of these latter limitations upon legislative power.

State ex rel. Northern Pac. R. R. Co. v. R. R. Comm., 140 Wis., 145, 157, 158.

Omaha Water Co. v. City of Omaha, 147 Fed., 1, 7. (C.C.A.)

It is well settled that the reserved power does not justify the impairment of an ordinance contract even as to such matters of public concern as rates of fare.

Note particularly the following cases:

Detroit v. Detroit Company, 184 U. S., 368.

Detroit United Railways v. Michigan, 242 U. S., 238.

Detroit United Railways v. Detroit, 248 U. S., 429.

Omaha Water Co. v. City of Omaha, 147 Fed., 1, 7. (C.C.A. 8th Cir.)

City of Lansing v. Michigan Power Co., 150 N. W., 250. (183 Mich., 400)

In *Detroit v. Detroit Company* above (184 U. S., 368) there was involved the question of the right of the City to alter rates of fare prescribed in an ordinance contract. The reserved power was urged in support of the alteration. (P. 377) This court at page 396 said:

> "The constitution of the State of Michigan, article 15, section 1, provides: 'Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed.' Counsel for the defendants contends 'that the regulation of rates of fare or toll upon the street railway is a governmental function, delegated by the legislature of the State of Michigan to the municipalities, and no matter in what form such delegation of power may be exercised, whether by ordinance or an assumed contract, it is nevertheless a law, subject to alteration, amendment or repeal. It has not been the policy of the State of Michigan since the adoption of the present constitution to permit irrevocable legislation. The State cannot do it itself, and if it cannot, surely

one of its creatures, like a city, cannot be permitted to do that which its creator is prohibited from doing.'

We have already seen that the legislature was competent to grant to the city of Detroit the right to give its consent to the laying of the tracks of a street railway and the operation of the same in and through its streets upon such terms and conditions as the parties might agree upon. The grant of this power was not the formation of a municipal corporation, directly or indirectly, either in substance or effect. The legislative act which granted the power to the city could not be altered, amended or repealed by the latter. No such power was given to it by the legislature and probably could not even be delegated in any event. It is sufficient to say that none was attempted. *City Railway Company v. Citizens' Railway Company*, 166 U. S. 557, 563.

The legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power so to do is not involved in this case."

The question thus reserved by the court, namely whether such an ordinance contract could be impaired by *direct* state action, was presented to and determined by this court in *Detroit United Railway v. Michigan* above (242 U. S., 238).

As we read these two cases, they settle the question here involved adversely to the defendants. The court below laid them aside upon wholly inadmissible grounds. As to the first of them (184 U. S., 368) it was said that this court had expressly refrained from passing on the question whether the State itself could amend the ordinance contract. As to the other (242 U. S., 238) it was differentiated on the ground that the subsequent legislation involved did not purport to directly amend the franchise and that its effect was merely incidental. This

ground of differentiation absolutely ignored the fact that it was upon the impairing *effect* of the subsequent general legislation that the decision of this court was rested, and, indeed, that the jurisdiction of this court was invoked and sustained.

In *Omaha Water Co. v. City of Omaha,* 147 Fed., 1 there was before the court the validity of subsequent legislative action of the City in alleged impairment of the rate provisions of an ordinance contract. Responding to the argument that the contract was subject to alteration under the constitution of Nebraska, the court, per Sanborn, Circuit Judge, at p. 7 said:

> "Nor does the section of the Constitution which provides that general laws affecting the charters of corporations may be altered or repealed condition the validity or the effect of this contract. That section is in pari materia with section 16, article 1, of the same Constitution, which prohibits the Legislature from passing any law impairing the obligation of contracts, and upon familiar principles the two provisions must be read and construed together. So read they provide that the Legislature may make an alteration or repeal of any general law involving the charters of corporations which does not impair the obligation of any contract and that it may make no repeal or alteration of those laws which has that effect. Vicksburg v. Vicksburg Waterworks Co. (May 21, 1906) 26 Sup. Ct. 660, 50 L. Ed. 1102. There was therefore no provision of the Constitution of Nebraska which inhibited or limited the authority of the Legislature to empower the city to make the contract in question."

The reserve clause is limited in its application to the alteration or repeal of charters of incorporation, and has no relation to contracts made in pursuance of chartered powers.

Neither ordinance contract constituted any part of the act of incorporation of the Company. It was no part of the corporate charter. The power to make the contract might as well have been conferred upon an individual as upon a corporation. The contract when made became a valuable property right. It was the subject of assignment by the original company and was in fact transferred to the present Company, and the latter, in reliance upon its provisions, executed it at large cost to itself and to the great advantage of the City. The transfer of the contract did not affect in the least the *corporate* franchise or chartered powers of the Company. We are thus dealing not with an amendment of the act of incorporation or formation of a corporation, not with an amendment to a corporate charter, *but with a contract,—a property right,—acquired in pursuance of the powers conferred upon the corporation.*

Looking to the language of the reserve clause in question, it will be noted that the only "general laws or special acts" which could be "enacted under the provisions of this section" are those under which a corporation is "formed" or "created". Hence it is only laws for the *formation* of corporations which may be "altered or repealed". That this is the limit of the reserved power is about as plain as language can make it.

Such was the construction placed by this court upon similar language of the Michigan constitution.

Detroit v. Detroit Company, 184 U. S., 368, 397.

The distinction between amendments of the charter of a corporation and amendments affecting property rights under the charter has been clearly recognized in a recent decision of this court, wherein it is said:

> "The so-called charter simply conferred upon the company the power to take lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant. If by purchase or by right of eminent domain under the charter powers the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may otherwise acquire from the owners specific rights in the use and flow of the water. *But these would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter.* Furthermore, the contract inhering in the charter (as distinguished from property acquired under the charter) was subject to the State's reserved power to amend or repeal, as provided in Art. XIII, Sec. 2, of the Ohio constitution."
>
> *Sears v. Akron,* 246 U. S., 242.

The distinction is also indicated in the following language of the court in *Louisville v. Cumberland Tel. Co.,* 224 U. S., 649, 661:

> "For while franchises to be are not transferrable without express authority, there are other franchises to have, to hold and to use, which are contractual and proprietary in their nature, and which confer rights and privileges, which can be sold wherever the company, as here, has power to dispose of its property."

And see also:

City of Lansing v. Mich. Power Co., 150 N. W., 250, 252.

Greenwood v. Union Freight Co., 105 U. S., 961.

Memphis Ry. Co. v. R. R. Comm'rs., 112 U. S., 609, 619.

Louisville v. Cumberland, Etc., Co., 224 U. S., 649, 661.

Los Angeles v. Los Angeles Co., 177 U. S., 558, 573.

Omaha Water Co. v. Omaha, 147 Fed., 1, 6, 7, (C.C.A.).

And this court has recently declared itself as "very averse to deciding that, without explicit declaration, every general law of the State applicable to corporations is enacted as an amendment to their charters".

C. B. & Q. Ry. v. R. R. Comm., 237 U. S., 220, 234.

The reserved power does not extend to interference with property rights lawfully acquired by a corporation.

Whether or not the reserved power is confined to the alteration or repeal of charters of incorporation, it certainly is settled beyond controversy that the power does not extend to the impairment or destruction of property rights such as those here involved.

It is the well settled doctrine of this court that the reserved power is one of reasonable public regulation and control. It does not authorize interference with property rights, contractual or otherwise, acquired under the granted powers of a corporation. Neither does it authorize legislation in impairment of the object of the grant.

Sinking Fund Cases, 99 U. S., 700.

Shields v. Ohio, 95 U. S., 319.

Pearsall v. G. N. R. Co., 161 U. S., 646.

Lake Shore Etc. Ry. Co. v. Smith, 173 U. S., 684, 697, 698.

Stearns v. Minnesota, 179 U. S., 223, 259.

Looker v. Maynard, 179 U. S., 46, 52.

Erie v. Williams, 233 U. S., 685, 701.
C. M. & St. P. Ry. Co. v. Wisconsin, 238 U. S., 491, 501.

Such also is the well settled doctrine of the Wisconsin Supreme Court.

State ex rel. Northern Pa. Co. v. R. R. Comm., 140 Wis., 145, 157, 158.
Water Power Cases, 148 Wis., 124, 146.

As stated in the *Sinking Fund Cases* (99 U. S., 700, 720):

> "That this power has a limit no one can doubt. All agree that it cannot be used to take away property *already acquired under the operation of the charter* or to deprive the corporation *of the fruits actually reduced to possession of contracts lawfully made.* ***"

And in *Shields v. Ohio* (95 U. S., 324):

> "Alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."

The reserved power "does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by *** taking of property without due process of law".

Stearns v. Minnesota, 179 U. S. 223, 259.

> "The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means."
> *Lake Shore Etc. Ry. Co. v. Smith*, 173 U. S., 684, 698.

> "In other cases the effect of the reserved power of amendment is said to be to make any alteration or amendment of a charter subject to it *which will not*

defeat or substantially impair the object of the grant or any right vested under the grant."

Erie Railroad Co. v. Williams, 233 U. S., 685, 701.

Illustration of the application of these limitations upon reserved power, involving a much more inconsequential interference with property rights than is here involved, is afforded by the recent decision of this court in the so-called Upper Berth case, in which was reversed the decision of the Wisconsin Supreme Court. In that case this court said:

"In the brief of counsel for the State it is argued that the statute can be sustained as a valid exercise of the State's reserved power to alter the charter of the Company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed such a ruling would seem to have been opposed to *State ex rel. Northern Pacific v. R. R. Comm.,* 140 Wis., 157, and the *Water Power Cases,* 148 Wis., 124, where it was held that the right to amend a charter does not authorize the taking of the Company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court." (Citing and quoting from above cited decisions of this court.)

C. M. & St. P. R. R. Co., v. Wisconsin, 238 U. S., 491 501.

In *State ex rel. Northern Pa. v. R. R. Comm.,* 140 Wis., 157, referred to by this court in the case last above cited, the Supreme Court of Wisconsin condemned a statute which required a railroad company to pay part of the expense of making and maintaining a subsequent crossing of its track by the track of another railway. The Wisconsin court cited and quoted from several of the decisions of this court above referred to, and among other things said:

"But the court below as well as the Railroad Commission held that the expense of maintaining the crossing and the cost of construction and maintaining the interlocking, derailing, and signal system should be borne one-half by each road. This conclusion is based upon the right of the State to alter or repeal the charter of the senior company and also under the police power. The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. *The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted.* (Citing cases)"

"The reserve power stops short of the power to divest vested property rights, and is embodied in the State constitution for the purpose of enabling the State to retain control over corporations, and must be construed in connection with the other provision of the constitution to the effect that private property shall not be taken for public use without compensation. It follows, therefore, that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. * * * Moreover, the power to alter or amend is a reserved power in the interest of the State to modify or repeal its own contract with the corporations. *Tomlinson v. Jessup*, 82 U. S. 454; *State v. C. & N. W. R. Co.*, 128 Wis., 449."

The fact that a corporate charter may be repealed in no way justifies interference with property or rights acquired under the charter.

Lake Shore Etc. Ry. Co. v. Smith, 173 U. S., 684, 698.

Owensboro v. Cumberland Telephone Co., 230 U. S., 58, 73, 74.

Other authorities showing that the reserved power may not be extended to the modification of such a contract right as that now before the court are cited below.

Detroit v. Detroit Plank Road Co., 43 Mich. 140.

People v. O'Brien, 111 N. Y. 1.

Ingersoll v. Nassau Electric Railroad Co., 157 N. Y. 453, 463.

Springfield Ry. Co. v. Springfield, 85 Mo., 674.

State v. Corrigan Consol. Ry. Co., 85 Mo., 263.

Hovelman v. Kansas City Horse R. R. Co., 79 Mo., 632.

Opinion of Justices, 66 New H., 629, 33 Atl. Rep. 1076.

Woodward v. Central Vermont R. R., 180 Mass. 599.

Rochester & L. O. W. Co. v. Rochester, 176 N. Y. 36, 49, 50.

Turnpike Co. v. Joel, 41 N. Y. App. Div. 43.

Russell v. Sebastian, 233 U. S. 195.

Larabee v. Dolley, 175 Fed. 365, 390. (Affirmed 219 U. S. 121)

St. Louis, Iron Mt., Etc., Ry. v. Paul, 173 U. S. 404, 408.

Northern Bank v. Stone, 88 Fed., 413, 426. (Per Taft, Cir. J.)

Southern Pac. Co. v. Railroad Comm'rs., 78 Fed. 236, 254.

County of San Mateo v. So. Pac. R. R., 13 Fed. 722.

County of Santa Clara v. So. Pac. R. R., 18 Fed. 385.

Venner v. Chicago City Ry. Co., 92 N. E. 643, 646. (Ill.)

Lewis v. Northern Pac. Ry. Co., 92 Pac. 469, 474. (Mont.)

Bank of Old Dominion v. McVeigh, 20 Gratt. 457. (Va.)

Ashuelot R. R. Co. v. Elliott, 58 N. H. 451.

Application of the foregoing limitations upon the reserved power to the case at bar.

As before noted, we are here dealing, not with an amendment to the charter of the Company, but with an attempted alteration of a contract made *under* and *in pursuance of* chartered powers. On the part of the City, the contract was made upon clear and express legislative authority, and, indeed, in the exercise of the proprietary or business powers of the City as to which it was as free to contract as an individual.

It is well settled that such a contract creates a vested property right, even as regards such matters of public concern as the use of streets, rates of charge, etc.

Boise Water Co. v. Boise City, 230 U. S., 84, 90.

Owensboro v. Cumberland Tel. Co., 230 U. S., 58, 65.

Covington v. S. Covington St. Ry. Co., 246 U. S., 413, 416.

N. Y. Electric Lines v. Empire City Subway, 235 U. S., 179, 193.

Fairhaven Ry. Co. v. New Haven, 203 U. S., 379.

As stated by this court in the case first above cited, 230 U. S., 84, 90:

"The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right. It has all of the attributes of prop-

erty. It is assignable and will pass under a mortgage sale of the property and franchises of the company which owned it."

And in *Owensboro v. Cumberland Tel. Co.*, 230 U. S., 58, 65:

"That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases. (Citing cases) As a property right it was assignable, taxable and alienable. Generally it is an asset of great value to such utility companies and a principal basis for credit."

1. That a *vested property right* thus acquired *under* the chartered powers of the Company is not within the reserved power of alteration is, as before noted, the established doctrine of this court, as well as of the Wisconsin and other courts.

2. What was the object and purpose of the chartered powers of the Company and of the powers delegated to the City? The purpose was to enable the Company to provide and the City to obtain a water supply. To the end that this purpose might be accomplished the legislature granted to the parties the right to contract upon such terms as should be agreed upon, and expressly empowered the City to purchase. In no way did the State attempt to prescribe in the charter the terms and conditions of the providing of the supply or of the acquisition of the property, and in no way did it attempt to make such terms and conditions the subject of any reserved power of alteration. The whole matter was left to the agreement of the parties and it was, indeed, declared that their contracts "shall be valid and effectual in law."

(See charter of Company, Sec. 1780a Wis. Stats. and charter of City, set forth in appendix.)

The purpose and object of the granted powers being thus to enable the parties to make valid and effectual contracts for the furnishing to and the acquisition by the City of a water supply, how can it be said that the application of the reserved power to the contracts so made is not in direct contravention to the rule that such power may not be so extended as to "defeat or substantially impair the object of the grant or any right vested under the grant."

Erie R. R. Co. v. Williams, 233 U. S., 685, 701.

3. The making of the purchase contract, namely, the contract to purchase on the earning basis in case of failure to renew the franchise, did not involve governmental powers delegated by the State to the municipality, but the exercise of its business powers as to which it was as free to contract as an individual.

Whatever view might be taken as to the application of the reserved power to the regulation or control of special franchise privileges, there is certainly no room to say that the power may be so extended as to strike down the obligation of the City to purchase in default of renewal in accordance with the contract terms. Performance of such contract of purchase would not have involved continued use of streets, or other matter of public regulation or control.

4. The application of the reserved power to the purchase contract in question makes of it an instrument of injustice and oppression rather than an agency for the promotion of the public good. The Company expended large sums of money upon the faith of the obligation of the City to purchase on the agreed basis in default of re-

newal upon the contract terms. Except for its agreement to purchase on such basis it could not have had the benefit of the lake supply. The City having enjoyed the benefit of its bargain for near thirty years what considerations of justice or right can sanction the striking down of the obligation to purchase at a *certain time* and on a *fixed basis* and the substitution therefor of an *elective* right on the part of the City to purchase *or not* at *any time* it sees fit for such *estimated* price and upon such *terms* as may be determined *by third parties?*

The decisions of the Wisconsin Supreme Court.

As noted by this court in *C. M. & St. P. Ry. Co. v. Wisconsin*, 238 U. S., 491, 501, the Wisconsin court has clearly recognized the above limitations upon the reserve power hereinbefore referred to.

State ex rel. Northern Pac. R. R. Co. v. R. R. Comm., 140 Wis., 145, 157, 158.
Water Power Cases, 148 Wis., 124, 146.
Atty. Gen. v. R. R. Co., 35 Wis., 425, 579.

Indeed, these limitations were expressly declared by the court below in the present case. (Tr. p. 58) The court said:

> "It is a power which the State is permitted to invoke only for the promotion and the protection of public interests. That is the purpose for which it was reserved. It is not to be used arbitrarily or capriciously or for the purpose of punishment or retaliation. That has been decided by this court. (Citing 140 Wis., 145, 148 Wis., 124) It is an instrument of justice not a weapon of discipline."

The difficulty is that the lower court did not apply to the case the limitations on the reserved power which the court itself recognized. As will be later pointed out, the

court's own view of the scope of the power necessarily demanded the upholding of the purchase contract.

Many Wisconsin authorities were referred to by the court below as supporting the proposition that the reserve clause was applicable, not merely to corporate charters, but to franchise privileges of a governmental nature granted by a municipality to a utility under legislative authority,—these latter being designated by the court as secondary franchises. Even giving such effect to the Wisconsin cases, in no sense made them controlling of the present case. The purchase contract did not involve special privileges of a governmental nature, but was made in the exercise of the business powers of the City, and conferred a property right *under* the franchise rather than a privilege of a governmental nature inhering therein.

Moreover, in determining whether the subsequent legislation operated to impair the contract in question, and to take the property rights of plaintiff without due process, this court is not bound by the decisions of the State court.

It may be appropriate, however, to briefly review the Wisconsin decisions referred to by the court. An analysis of them will disclose that the court below was in error in stating it to be the Wisconsin doctrine that the reserve clause was applicable to so-called secondary franchises.

The cases referred to by the court at p. 50 and 51 of the transcript, down to the cases in 35 Wis., so far as in point at all, all had reference to privileges of a *governmental nature* embraced in the *charter of incorporation.*

In one of them, referred to by the court at some length, the distinction is expressly drawn between such charter privileges, and contracts made pursuant to the charter.

Kenosha, etc., Ry. Co. v. Marsh, 17 Wis., 13, 16.

In the latter case, the court said:

> "The occasion of reserving such a power either in the constitution or in charters themselves is well understood. It grew out of the decisions of the supreme court of the United States, that charters were contracts within the meaning of the constitutional provision that the states should pass no laws impairing the obligation of contracts. This was supposed to deprive the states of that power of control over corporations which was deemed essential to the safety and protection of the public. Hence the practice, which has extensively prevailed since those decisions, of reserving the power of amending or repealing charters. But this power *was never reserved upon any idea that the legislature could alter a contract between a corporation and its stock subscribers, nor for the purpose of enabling it to make such alteration.* It was solely to avoid the effect of the decision that the *charter itself* was a contract between the state and the corporation, so as to enable the state to impose such salutary restraint upon these bodies as experience might prove to be necessary."

In some of the cases, the language of the court very clearly evidences the judicial conception that the reserve clause has reference only to acts of incorporation. Thus, in one of them, the court said:

> "Our people, by a most wise and beneficent provision in their Constitution, have perpetually reserved the power to the legislature to alter or repeal *all charters or acts of incorporation,* at any time after their passage."
>
> *Whiting v. Sheboygan, etc., R. R. Co.,* 25 Wis., 167, 198.

West Wisconsin Ry. Co. v. Trempealeau Co., 35 Wis., 257, which dealt with the subsequent repeal of a corporate exemption from taxation, rests chiefly upon the ground that one legislature could not relinquish the right of taxation in such a way as to prevent subsequent legis-

latures from resuming such right. Moreover, the court was dealing not with a contract, but with a gratuity. This is pointed out in the decision of the Federal Supreme Court in which the case was affirmed. (93 U. S., 995) The state court clearly recognized in its opinion (p. 272) that the reserved power may not take away property acquired by a corporation.

> "It may be conceded that the legislature, under the power of revocation, could not divest the company of its title to the land after it was earned, nor take away its property which it had acquired. The property of the corporation, for all moral purposes, stands upon the same ground as the property of an individual, and is equally protected by the Constitution."

In the case of *Atty. Gen. v. R. R. Co.*, 35 Wis., 425, in which the reserved power was, for the first time, exhaustively discussed, the court was dealing with a law which operated to amend *special charter provisions* relating to *rates*. Distinguishing between such *charter* privileges and property rights acquired under the charter, the court, at p. 579, said:

> "And the Act does not at all meddle with the material property, distinct from the franchise. It acts only on the franchise, not at all upon the material property. And it is sufficient to say that they acquired the material property, as distinct from the franchise, subject to the alteration of the franchise under the reserved power. That was a condition under which they chose to hold their property; and they have no right to complain when the condition is enforced. *Their rights in their material property are inviolate, and shall never be violated with the sanction of this court.*"

As later noted, the court further held, in substance, that the reserve clause had reference to acts of incorporation.

This leading case was the last expression of the State court until after the original ordinance contract had been made and accepted.

The first suggestion of the Wisconsin court that the reserved power was applicable to so-called secondary franchises, appears in the case of *State ex rel. Cream City Co. v. Hilbert*, 72 Wis., 184, decided subsequently to the acceptance of the original ordinance. The case involved the right of a municipality to change a license fee provided for in an ordinance granted to a street railway company under legislative authority. It came up on a demurrer to a petition for mandamus. The court regarded the relator as bound by the averments of its petition, and inasmuch as the petition rested the corporate power to construct and operate the railway wholly upon the franchise granted by the City under legislative authority, treated such franchise as one creating corporate privileges which would be subject to alteration, holding also that the right to increase the license fee was reserved by the statute under which the ordinance was granted. The license fee provision involved was a matter of governmental nature, and the case in no way involved proprietary rights such as those now before the court.

In *Ashland v. Wheeler*, 88 Wis., 607, which involved an attempted change by a municipality of rates provided for in a municipal franchise, the court held that the municipality was without the delegated power to alter the franchise, incidentally injecting, however, the statement, that the legislature "might alter or repeal it at will." This statement was not only unnecessary to the decision, but, as before noted, was in conflict with the previous repeated declarations of the court as to the protection of property rights acquired under a franchise.

The failure of the court in each of the two cases last cited to note the distinction between the act of incorporation and rights acquired under it was expressly pointed out by the court in the later case of *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis., 408, 418.

C. M. & St. P. R. R. Co. v. Milwaukee, 97 Wis., 418, is inaccurately stated by the court below in that it does not note the distinction which was expressly drawn between the right, under the police power and the reserved power, to require the Railway Company to make, without compensation, structural changes demanded by public safety, and changes which were not thus within the police power but involved impairment of property rights. The case does not support, but is adverse to, the decision of the state court in the instant case.

State v. Ry. Co., 128 Wis., 449, 505, involved amendment of charter provisions relating to taxation, and hence of a governmental character, similar to that involved in *Atty. Gen. v. R. R. Co.*, 35 Wis., 427, and was ruled by that case.

In subsequent decisions, the Wisconsin court had occasion to consider the distinction between corporate franchises and those not involving corporate privileges, in their relation to the provisions of the State Constitution. By an amendment to the Constitution adopted in 1871 it was provided that:

> "The legislature is prohibited from enacting any special or private laws in the following cases: ••••
> "7th, for granting corporate powers or privileges, except to cities." (Section 31, Art. IV)

In determining the scope of this language, the state court has repeatedly held that it was limited to grants of corporate franchises as distinguished from subsequent grants of franchises or privileges which might be parted

with by the corporation without affecting its corporate franchise or corporate existence.

In Re Southern Wisconsin Ry. Co., 140 Wis. 245, 258.

Linden Land Co. v. Milwaukee Co., 107 Wis. 493, 514.

State v. Portage W. W. Co., 107 Wis. 441.

It is obvious that the language "granting corporate powers or privileges" as used in section 31, article IV, is no more restricted than the language of section 1, article XI, which permits the alteration or repeal of acts under which corporations are "formed" or "created".

In the leading case of *Attorney General v. Ry. Companies*, 35 Wis. 425, 560, the court considered the two sections together, and held that the effect of Art. IV section 31 was merely to take away the legislative discretion which existed under section 1, article XI, to create corporations by special act, and to make it mandatory that in *all* cases they be created or formed by general act,—leaving the reserved power where it stood before. This ruling clearly imports that both provisions of the Constitution had relation to the same thing, namely acts for the creation or formation of corporations.

In *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, the court found it unnecessary to determine the question whether a special franchise privilege other than a corporate franchise was within the reserved power; but to the end that such disposition of the case should not be "taken as doubting the state of the law on the question", quoted the language appearing at page 57 of the transcript. We cannot construe the language of the court at pages 457 and 458 of its opinion otherwise than as a plain ruling that the reserved power had relation only to cor-

porate franchises, as distinguished from rights and privileges owned by a corporation in its proprietary capacity.

In *Calumet Service Co. v. Chilton,* 148 Wis. 335, Judge Marshall, who wrote the opinion in the La Crosse case above, industriously appended a supplementary opinion, directing attention to an inadvertent expression in his opinion in the La Crosse case which he thought might be misleading as to the position of the court. Referring to cases before cited, Judge Marshall (148 Wis. 370) said:

> "As said, in terms or effect, in all, it is only a franchise by act of incorporation, or a corporate charter, or a privilege inhering therein as a part of the organic act, which is a corporate franchise, and so within sec. 31, art. IV, of the constitution prohibiting the granting of corporate powers or privileges by special act and within sec. 1, art. XI, as to legislative power to grant corporate charters, but reserving the right to repeal, alter, or amend."

In the case of *Milwaukee E. R. & L. Co. v. R. R. Comm.,* 153 Wis. 592, the three judges who concurred in the main opinion based their conclusions on grounds not involving the reserved power. Two of the judges concurred in the view that the power had application only to acts of formation of corporate charters, Judge Timlin alone giving a broader application.

We believe that a review of the Wisconsin cases will convince this court:

(1) That it has never been the Wisconsin doctrine that the reserved power extended beyond the alteration or repeal of acts or charters of incorporation; (2) that the suggestions to the contrary contained in the cases in 72 and 88, Wisconsin, were later corrected by the court, and, moreover, that such suggestions were limited to the extension of the power to franchise privileges of a corporate and governmental nature granted by a municipality

as a state agency; (3) that from the beginning the cases have uniformly denied the application of the reserved power to proprietary rights acquired under or by virtue of corporate franchises, and have preserved inviolable property rights thus created; and (4) never has it been suggested,—not even in the opinion of the state court in the case at bar,—that the reserved power was applicable to contracts entered into by a municipality in the exercise of its proprietary or business powers.

IV.

UPON THE STATE COURT'S OWN VIEW OF THE SCOPE OF THE RESERVED POWER THE CONTRACT WAS IMPAIRED.

The court held that under the reserved power the state might lawfully substitute the indeterminate permit for the thirty-year municipal franchise and thereby preclude the city from exercising its election to renew the franchise for another period of thirty years upon the contract terms. It did not carry the reserved power farther than this. It expressly disclaimed any purpose to pass on the contention of the Company that the contract to purchase (in default of renewal) was entered into by the city in its business or proprietary capacity, and was not a part of or inherent in the public franchise for the use of the streets. It declared that "the position of the waterworks company is not helped by construing this provision of the ordinance as a contract made by the city in its proprietary capacity." Thereby the court avoided the question whether the reserved power could be so far extended as to strike down the obligation to purchase.

The court then proceeded to achieve the same result in

another way. It relieved the city from its purchase obligation, not by extending or applying the reserved power thereto, but by invoking the doctrine of breach of contract. It held that inasmuch as the state before the end of the term franchise had converted it into an indeterminate one (in virtue of the reserved power as interpreted by the court), there was no occasion for the city to renew,—that there had thus been lawfully forced on the Company a franchise which was just as good or better than the one the city had contracted, at its election, to grant, and that this satisfied the condition upon which depended its obligation to purchase on the contract terms.

Assuming for the argument that the reserved power furnished sufficient sanction for the legislature to substitute an indeterminate term for the then existing contract term of thirty years, what was the result and what the remaining question?

The result merely was to take away the municipal power of election to renew on the contract terms. Otherwise stated, the legislature merely made the election for its agency, the municipality, *not to renew* on such contract terms. (187 Fed. 896, 899) But this did not abrogate the contract of purchase. It merely removed the condition upon which alone depended the obligation to purchase on the contract terms. The situation was created to which applies the frequently declared rule that where a city reserves an option of renewal, and agrees that in default of renewal it will purchase on agreed terms, failure to renew, *even though due to subsequent legislation preventing it,* makes absolute and enforceable the contract of purchase. (See cases cited in concluding subdivision of division I of this brief).

Recognition of this rule would necessarily have presented to the court below the question whether the reserved power was broad enough, not merely to take away the contractual right of election to renew, *but to destroy the absolute contract of purchase which resulted from the legislative removal of this right of election.*

This important question as to the scope of the reserve power the court did not decide but expressly avoided.

Had the court permitted itself to face this question, it would have confronted this further and final one: In view of the well settled doctrine of the Wisconsin court (as well as of other courts) that the acquisition of a water supply involves, not the governmental, but the business or proprietary powers of a municipality in the exercise of which it may contract as effectively as an individual, and that contract provisions as to such acquisition are not a part of and do not inhere in the special privileges of public concern which characterize franchises, whether primary or secondary, may the reserve power to alter or repeal legislative acts for the formation of corporations be so far stretched as to permit the legislature to strike down the authorized and absolute obligation of the city to purchase the property at the end of the franchise term on the contract basis which had induced the Company to make the large expenditures of which the city was the beneficiary?

This question answers itself. The court below could not have answered it in the negative without overruling the entire Wisconsin doctrine as to the sanctity of contracts made by a municipality in the exercise of its proprietary powers, or without disregarding the limitations which the court itself placed upon the reserved power,—namely, that it may be "invoked only for the promotion

and the protection of public interests" and not arbitrarily or capriciously or oppressively. (Tr. p. 58) Even though the court might have considered it within the boundaries of these limitations for the legislature to convert determinate into indeterminate franchises, no consideration of public interest could have justified it in going to the extreme of holding that the absolute contract of purchase on fixed terms could be destroyed by the substitution of an elective right of the municipality to take for compensation, and on terms, to be prescribed by third parties. One can conceive how public interest might be concerned in making indeterminate the terms of public utility franchises, and in the regulation of their rates, and perhaps in affording municipal *opportunity* for the acquisition of their property. But, after these things are brought within the reserved power, no consideration of promotion or protection of public interest could justify a law which permits a municipality, already possessed by previous contract, not merely of the *opportunity* of purchase, but by the same contract being absolutely bound to purchase on prescribed terms, to purchase or not as it pleases, and if it elects to purchase, to do so on a basis wholly different from that provided in its contract.

We give but passing attention to the theory on which the state court avoided determining whether the contract of purchase was an exercise of the proprietary or business powers of the city (and therefore in no sense within the scope of the reserved power), namely, that because the legislature had forced on the contracting parties a franchise indeterminate as to time this satisfied the condition as to renewal upon which depended the obligation to purchase and there was no breach of that obligation.

Whether or not there was a breach of the contract, de-

pended on whether the party alleged to be in default had rendered that which the parties to the contract intended he should render when the contract was made.

By the terms of the contract, the absolute obligation of the city to purchase became effective unless it should "grant to the **** company" an extension "for another term of thirty years upon the same terms and conditions as may exist between the said village or city and the said **** company at the expiration of the first thirty years." (See provisions section 1, original ordinance, relating to purchase and providing that in case of purchase the basis shall be as provided for in section 13, namely the appraisal basis, and see ordinance No. 36 changing appraisal basis to earning basis. Tr. p. 15, 26.)

This meant, of course, that the thing which the Company should receive in the event of exercise of renewal by the city should be a franchise under the then existing system of contractual arrangement between municipality and company, which should be *granted* by the *city* to the *Company* for the *prescribed thirty-year term* upon the *mutually agreed conditions* which might exist at the termination of the original franchise. It is perfectly obvious that it was not within the remotest intent of the parties that the renewal provisions of the contract would be satisfied by an indeterminate permit *forced by the state upon utilities generally.* Such indeterminate permit was not *granted* by the *city* to the *Company* as a matter *of contract* it did not conform to the *renewal term of thirty years,* and most important of all, it was not expressive, but in entire contravention, of the *mutually agreed terms* existing at the time of expiration of the original ordinance.

Whatever be the merits of the reasoning adopted by the state court, the net result is that it so construed and

applied the public utility act, and particularly 1797—77 (Wis. Stats.) thereof, as to impair and destroy the obligations of the purchase contract.

So far as concerns the jurisdiction of this court, it makes no difference that the court below achieved this result (1) by holding that under the reserved power the legislation in question lawfully operated to convert the determinate franchise into an indeterminate one, and (2) by so construing and applying the legislation and the contract as to make the former satisfy the renewal provisions of the latter.

As stated by this court:

> "But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation.
>
> • • • •
>
> "The necessary operation of the decisions under review is to give an effect to the annexation acts that substantially impair the alleged contract rights of plaintiff in error as they theretofore stood; *and it makes no difference that that result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error.* Whether the agreement thus invoked, when properly construed, has the effect attributed to it, is a question that touches upon the merits, and not upon the jurisdiction of this court."
>
> *Detroit United Ry. v. Michigan*, 242 U. S. 237, 247, 248.

V.

THE IMPAIRING LEGISLATION CANNOT BE JUSTIFIED UPON THE GROUND THAT THE POWER OF EMINENT DOMAIN CANNOT BE CONTRACTED AWAY.

This seems to be the chief ground upon which the City founds the present motion. Many pages of its brief are devoted to the subject and many authorities cited which are mostly to the effect that the sovereign power of eminent domain cannot be suspended or abrogated.

We might well agree that a contract which would foreclose the subsequent exercise by the state of this sovereign power would not be within the protection of the impairment clause. But that is not this case.

By the purchase contract in question, neither the state nor the city attempted to suspend the right of eminent domain. The city, under legislative authority, agreed to purchase the property on prescribed terms. This did not prevent it from later condemning the property, if so authorized by the legislature, but the power must be exercised *in recognition, not in contravention, of the contractual obligation of purchase.*

Long Island Water Supply Co. v. Brooklyn, 166 U. S., 685, 690, 691, 693.

New Orleans Gas Co. v. La. Light Co., 115 U. S., 650, 673.

Hall v. Wisconsin, 103 U. S., 5.

West River Bridge Co. v. Dix, 6 How., 507.

In the case first cited (166 U. S., 685), the court, at p. 691, said:

> "The true view is that the condemnation proceedings *do not impair the contract, do not break its obligations, but appropriate it,* as they do the tangible

> property of the company, to public uses. • • • The Commissioners, after a hearing, valued first the tangible property at $370,000 and the franchises, contracts and all other rights and property, *including this particular contract,* at $200,000. In other words, the condemnation proceedings did not repudiate the contract, but appropriated it and fixed its value."

In *West River Bridge Co. v. Dix,* 6 How., 507, the court said:

> "This right (of eminent domain) does not operate to impair the contract affected by it, *but recognizes its obligation in the fullest extent,* claiming only the fulfillment of an essential and inseparable condition."

Here the right of condemnation is sought to be exercised in repudiation of the provision of the purchase contract that the property be purchased and paid for on the prescribed basis of capitalized earnings. (Tr. p. 12) And the lower court so construed and applied the Public Utility Act, particularly Sections 1797m—77 and 1797m—82, as to permit the property to be condemned upon an appraisal value found by the Railroad Commission which should exclude consideration of the contract of purchase. Otherwise it could not have held that the complaint failed to state a cause of action.

VI.

THE CONSTITUTIONAL RIGHTS OF PLAINTIFF WERE INVADED BY THE SUBJECTION OF THE MINNESOTA PROPERTY TO CONDEMNATION UNDER THE LAWS OF WISCONSIN.

The state court concedes that the proceedings under which the city (in repudiation of the contract of purchase) is attempting to acquire the property of the Com-

pany are in the nature of condemnation. See opinion, tr. p. 65, and also,

Connell v. Kaukauna, 164 Wis. 471, 478.

They are so characterized by the statute in question (Sec. 1797m—77) which grants to a municipality "the power subject to the provisions of sections 1797m—1 to 1797m—109 inclusive, to acquire by *condemnation* the property" etc.

Moreover there is no way for the municipality to get property against the will of its owner except by the exercise of the power of eminent domain.

The Minnesota property was not subject to condemnation in Wisconsin.

Eminent domain is of course a sovereign power. It cannot be exercised over property which is beyond the jurisdiction of the sovereign.

This also was conceded by the state court, which said (on rehearing):

> "The question with which we are confronted is whether that part of the water plant which reaches across the state line into the waters of Lake Superior, from which the supply of water is pumped for the use of the city, is *in fact* Wisconsin property. We freely concede at the outset that that question must be answered in the affirmative in order to enable the city to proceed to continue the proceedings now instituted to a successful termination, and that unless the question may be so answered the demurrer to the complaint should be overruled." (Tr. pp. 65, 66)

But though the real estate on Minnesota Point, and the rights of way, were *in fact* irremovably located in Minnesota, were subject to taxation under its laws, were subject to its police power and to its transfer and recording

laws, and were subject to condemnation under *its* laws, and though the state of Minnesota had never consented that the sovereignty of Wisconsin might be extended to the property (Complaint, p. 12) and its statutes inferentially negative the existence of a right of eminent domain in foreign municipalities, (See sections 1376 and 1499, Minn. Stats. 1913), the state court subjected the Minnesota property to condemnation in Wisconsin.

This rather remarkable achievement was accomplished by first converting—perforce Wisconsin judicial decisions—the real estate into personalty, and then—again perforce Wisconsin judicial decisions—transferring the situs of the converted real estate to the Wisconsin home of its owner. Sovereignty by legal fiction was thus held to be sovereignty in fact. (Tr. pp. 66, 67)

It is unnecessary to cite authority to the proposition that the territorial limits of a state, and hence the subject matter over which it may exercise the sovereign power of eminent domain, is dependent on the fact, not upon legal fictions set up by the courts of the state which asserts the power.

That the court should have read these legal fictions into section 1797m—77 and thereby subjected the Minnesota real estate to condemnation under that statute and others therein referred to, is the more remarkable when it is considered that the statutory definition of an "indeterminate permit" limits the property held under it (and thus the property subject to be condemned) to property "in this state".

Also when it is considered that the Wisconsin Constitution precludes a municipality from taking property for public use against the consent of the owner "without the necessity thereof being first established by the verdict of

the jury" (Sec. 2, Art. XI), and that in virtue of this constitutional provision Sec. 1797m—80 makes it a condition precedent to condemnation under the indeterminate permit law that a verdict of necessity be obtained. The property referred to in the constitution and in the statute is manifestly that which is *in fact* within the territorial sovereignty of the state,—not such as the courts of Wisconsin should bring within the sovereignty by legal fiction.

The court attempted to justify its conclusion by the analogy of judicial power to require a conveyance of land in another state, though it admits that this goes on the principle of the jurisdiction of the person rather than of the *res*. But condemnation depends upon the *territorial* jurisdiction of the *sovereign* over the thing condemned, not on *judicial* jurisdiction over its owner. If it were not so, Wisconsin might authorize one of its railroads to condemn in Wisconsin a right of way in Oregon, or in Canada for that matter.

For this reason, the attempt of the Wisconsin legislature (following the suggestion of the court below) to vest authority in the state circuit court to require a conveyance of foreign property after the compensation and terms of purchase had been fixed by the Commission is quite unavailing. (See slip appended at page 39 of brief for city.) The state cannot broaden its territorial jurisdiction by its own fiat any more than its courts can do so by legal fiction.

Equally futile is the attempt of the court to supply a contractual feature in this case which will bring it within the calls of the principle that a court of equity, having jurisdiction of the person, may require conveyance of lands outside the state. (Tr. p. 68) The reasoning of the

court assumes that the state could impair the contract of purchase, not merely by substituting an indeterminate term for the contract term but by subjecting the property of the Company to condemnation under the public utility act, which, as before shown, the state could not lawfully do. But aside from this, the theory of the court assumes that contractual *consent* of the Company to the taking of its Minnesota property by condemnation can be spelled from state action *against its consent* and in contravention of its contractual rights.

The fact that the Minnesota property cannot be taken by Wisconsin proceedings to condemn it in no way argues that the contract of purchase was invalid by reason of lack of power on the part of the city to acquire and own a water supply in the state of Minnesota.

The court below agreed that it could lawfully do so (Tr. p. 68) and counsel for the city cite many cases to that effect in its brief on this motion (pp. 35—37).

The trouble with both court and counsel is that they do not distinguish between the power of the municipality to acquire by contract property outside the territorial limits of the state and the sovereign power of the state to condemn property which is in fact beyond such territorial limits. That it may do the former, see also

Schneider v. Menasha, 118 Wis. 298.
McQuillin on Municipal Corps., (Sec. 1108)
Tiedeman on Municipal Corps., (Sec. 201)
McDonogh Will Case, 15 How. 367.
Bank of Augusta v. Earle, 13 Pet. 519, 584.
Champaign v. Harmon, 98 Ill. 491, 494—495.
Manning v. Devils Lake, 99 N. W. 51, 65; L.R.A. 187, 192 (N. D.)
Newman v. Ashe, 9 Baxt. 380, 383 (Tenn.)

Subjection of the Minnesota property to condemnation under Wisconsin statutes contravenes rights guaranteed to the Company by the Federal Constitution.

Even though provision is made for compensation, the attempted condemnation by the state of property which is not the subject of condemnation at all, operates to deprive the owner of property without due process of law.

C. B. & Q. Ry. v. Chicago, 166 U. S. 226, 234, 235, 241.

Heitmuller v. Stokes, 266 Fed. 1011, 1012.

And to deny to the owner the equal protection of the laws.

Looker v. Maynard, 179 U. S. 46, 52.

Gulf, Colorado, Etc., Ry. v. Ellis, 165 U. S. 150, 153, 154.

Southern Ry. Co. v. Greene, 216 U. S. 400, 412, 413.

And to take the property of the owner in contravention of the contract clause, in that efficacy is denied to the lawful contract of purchase.

And appropriates the instrumentalities by which water is produced in one state and transmitted to another for sale therein,—which is interstate commerce,—in contravention of the commerce clause. Such appropriation of the instrumentalities by which the commerce is conducted is quite different from the exercise by the state (assuming that it is not prevented by legislation by Congress or by the valid contract of the parties) of the power to regulate the local rates to be charged for the product.

Pa. Gas Co. v. Public Serv. Comm., 252 U. S. 23.

U. S. Express Co. v. Minn., 223 U. S. 335, 342.

No injustice results from the inability of the state to extend its power of eminent domain over property of a public utility which may be operating in one of the border cities of this state.

In the present case, all the city has to do is to perform its contract of purchase, as of right it should do.

As to border cities in which the utility commenced operating subsequent to the passage of the public utility law in 1907, or in which the utility has voluntarily surrendered its former franchise and accepted the indeterminate permit, condemnation may be had under the provisions of the public utility statutes. There is probably no border city not thus circumstanced, but if there be any, it may acquire utility property under the provisions of its municipal franchise, which almost uniformly embrace provisions for acquisition.

As to the contention that the Company has been collecting rates prescribed by the Railroad Commission based on the value of the Minnesota as well as of the Wisconsin property, and should be estopped from objecting to the condemnation of the Minnesota property.

The fact would be immaterial, if true, especially upon the jurisdictional questions here involved. Moreover, neither the Company nor the Railroad Commission could enlarge the territorial jurisdiction of Wisconsin, or its powers of condemnation.

But aside from this, counsel err in the facts. It is true that the Railroad Commission was appealed to in 1912 to reduce the water, gas and electric rates in Superior. As to the gas and electric properties of the Company, it had voluntarily surrendered its municipal franchise and

accepted the indeterminate permit. The Commission valued all three properties and along with its consideration of the gas and electric rates, considered the reasonableness of the water rates which were being charged under the provisions of the ordinance contract. It found that the water rates were yielding a return of less than six per cent, but said that "owing to contractual features involved in this case no adjustment of water rates can be ordered at the present time", and, for this reason, did not disturb the rates.

10 Wis. R. R. Comm. Reports, 708, 752, 768, 850.

It is respectfully submitted that the motion to dismiss should be denied.

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APPENDIX.

The Charter to Superior Water Works Company.

The company was incorporated by Chapter 359, Laws of 1866. By section 8 of the act the company was authorized to acquire and hold lands, etc., "for the purpose of supplying said town of Superior and its neighborhoods with pure water," etc.; and by section 9 it was given the power of condemnation.

By section 15 it was provided:

> "The said company may make any *agreements, contracts, grants and leases* for the sale, *use and distribution of water* as may be *agreed upon* between said company and any person or persons, associations and corporations, *and with the town of Superior, or neighboring towns;* or the said company itself may take and use the surplus water for manufacturing or other purposes; *which said agreements, contracts, grants and leases shall be valid and effectual in law.*"

The General Statutes.

In 1879 section 1780 R. S. 1878, (which related only to corporations for the manufacture of gas) was amended by Chapter 211, Laws of 1879. This amendment added the following:

> "Any corporation formed for the purpose of constructing and operating water works in any city or village in this state, *may make and enter into any contract* with such city or village to supply such city or village with water for fire and other purposes *upon such terms and conditions as may be agreed upon,* and may, by the consent of and *in the manner agreed upon* with the proper authorities of such city

or village, use any street, alley, lane, park or public grounds for laying water pipes therein, provided no permanent injury shall be done to the same, and any such city or village may, *by contract*, duly executed by the proper authorities, acquire the right *to use the water supplied by such corporation*, or such portion thereof as it may desire, *upon such terms and conditions as may be agreed* upon by such corporation and the authorities of such city or village. Every such corporation heretofore organized *shall continue to enjoy* the rights given by the law under which it was formed."

In the revision of 1898 the above amendment of 1879 to section 1780 was placed in a separate section, numbered section 1780a, there being inserted, by the revision, the language "under general or special law" after the word "formed" in the first line.

The Charter of the City of Superior.

Section 234 of Chapter 152, Laws of 1889, (being the city charter, adopted March 25, 1889) provides:

> "All franchises heretofore granted, or contracts entered into, by the Village of Superior shall continue and remain in force in accordance with the terms thereof, as if the same had been granted or entered into by the said City of Superior."

Subsec. 33 of sec. 35, Chapter VI of the city charter, in enumerating the powers of the common council, provides as follows:

> "*To provide for the purchase, construction, maintenance and operation of water works for the supply of water to the inhabitants of the city, and to supply such city with water for fire protection* and other purposes; and to secure the erection of water works, said city may, *by contract or ordinance*, grant to any person, persons, company or corporations, the full right and privilege to build and own such water

works, and to maintain, operate and regulate the same; and in doing so, to use the streets, alleys and bridges of the city in laying and maintaining the necessary pipe lines and hydrants *for such term of years and on such conditions as may be prescribed by such ordinance or contract;* and may also, *by contract or ordinance,* provide for supplying from such water works, the city with water for fire protection and for other purposes, and also the inhabitants thereof with water for such term of years, for such price, in such manner, and subject to such limitations *as may be fixed by said contract or ordinance.*"

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United States Supreme Court

October Term 1922

No. 436

SUPERIOR WATER, LIGHT & POWER COMPANY,

Plaintiff in Error,

vs.

CITY OF SUPERIOR AND F. A. BAXTER, AS MAYOR, AND C. N. O'HARE AND F. C. TOMLINSON AS COMMISSIONERS OF THE CITY OF SUPERIOR,

Defendants in Error.

This is a writ of error from the Supreme Court of Wisconsin to review the final decision of that court holding valid and constitutional the provisions of the involuntary, indeterminate, franchise statutes of Wisconsin, (sections 1797m-79-3 et. seq.)(passed under the reserve power in section 1, article XI, of the state constitution.

Most of the questions involved are quite fully briefed in the two opinions of the state court (T. of R. 42, 46 and 64) and in the brief of the city submitted on its motion to dismiss the action in this court upon the ground that either under the reserve power in the state constitution or under the power of eminent domain there were no unsettled federal questions

involved in the case; but as the decision of the court upon that motion has been withheld to be disposed of with the hearing on the merits of the case, the defendants in error submit the following supplementary brief, with special reference to decisions of the United States Courts bearing on the two main questions of:

1st. The validity of the state statute under the reserve power in Section 1, Art. XI, in the state constitution; and

2nd. The validity of the law as a condemnation statute under the power of eminent domain.

RESERVED POWER.

Charters and franchises are special privileges, rights and powers granted by and obtained from the government and the general rule for their construction is that they shall be construed strictly against the corporation and every reasonable doubt is to be resolved in favor of the state.

7 R. C. L., page 91.

Another general rule of construction is that every doubt is to be resolved in favor of the constitutionality of a statute.

Craig vs. O'Rear, 251 S. W. 821.

Sweet vs. Reckel, 159 U. S. 380.

Home Telephone and Telegraph Co. vs. Los Angeles, 211 U. S. 265-281.

These general rules of law have been stated in many different forms in many different cases. For a compilation of cases (See 6 R. C. L., page 97, and subsequent pages).

Corporations are the creations of the state and are endowed with such powers and are subject to such conditions and limitations as the state imposes, and if the power to modify

their charter is reserved, such reservation is a part of the contract with the state and no change within the legitimate scope of such reserved power can be said to impair its obligations.

7 R. C. L., page 117.

Such reserve powers have been made in several ways. Some are in general statutes, some in special charters or franchises, and in some states, like Wisconsin, the reservation was incorporated in the constitution and thereby the legislature is prevented from ever granting an irrevocable or unalterable charter or franchise.

7 R. C. L., page 117.

State vs. Campbell, 142 N. C. 604; 55 S. E. 820; 9 A. M. Cas. 141; 8 L. R. A. (N. S.) 498.

Wagner Free Institute vs. Philadelphia, 132 Pa. St. 612; 19 A. T. L. 297; 19 A. S. R. 613.

Corporate franchises are sometimes said to contain three general powers:

(1) The power to organize and exist as a corporation;

(2) The power to act, generally, as a corporation; and

(3) The special powers which are not possessed by individuals under general laws.

7 R. C. L. 888.

Detroit Citizens S. T. R. Co. vs. Detroit, 125 Mich., 673; 85 N. W. 96; 86 N. W. 809; 84 A. S. R. 589.

The above classification would cover both franchise and charter powers, so called, or primary and secondary francises as they are designated in the opinion of the state court (T. of R. 49), Each comes from the state either directly or indirectly and each is an exercise of the same authority and power of the government. The state court in this case says, (T. of R. 47): "It is well settled in this state that an ordinance of this

kind constitutes a legislative franchise eminating from the state to the corporation. The common council acts as the agent of the state and the privileges conferred by its ordinance are as much a legislative franchise as if it had been granted by an act of the legislature." (T. of R. 47.) Citing cases. Neither power can be exercised without authority directly or indirectly from the state.

The supreme court of Montana construing a statutory provision which reads: "The legislative assembly may at any time amend or repeal this act or any chapter or section thereof and dissolve all corporations created hereunder," the court says: "The plaintiff is a domestic corporation owing its very existence and right to transact business to the grace of this state expressed through our general incorporation laws, and though its charter is a contract, it was sought and accepted upon the express condition declared by our state constitution that the laws authorizing it 'shall be subject to future repeal or alteration by the legislative assembly.' If instead of enacting the occupation tax statute our legislature had repealed the statute under which plaintiff exists, its powers to explore for or produce petroleum in this state would have been destroyed, absolutely, and plaintiff could not have been heard to complain."

Mid. Northern Oil Co. vs. Walker 211 Pac. 353.

Under the reserve provisions of the Alabama constitution, section 229, which made the charters of corporations subject to amendment, alteration or repeal, it was held that such provisions became a part of the contract of the holders of stock of a corporation organized after its adoption.

Randall vs. Missouri Coal Co., 89 So. 790.

The reservation of the right to alter and repeal in the charter of a corporation has none of the characteristics of a mere power which when once exercised is exhausted. Its effect is on the legislative grant itself to prevent its ever becoming what it otherwise might become, a contract with the state. An act containing such a provision confers a mere privilege sub-

ject at any time to be withdrawn or modified at the will of the legislature.

12 Corpus Juris 1026.

Pennsylvania College Cases, 13 (Wall.) U. S. 190; 20 L. ed. 550.

State vs. Railway Tax Commission, 37 N. J. L. 328.

"It is difficult, if not impossible to define the extreme limit of the exercise of the power reserved to the legislature to amend or repeal charters. **It may be safely stated, however, that the legislature has authority to make any alterations or amendments in a charter granted, subject to such reserve power, which will not defeat or substantially impair the objects of the grant or any rights vested under it and which it may deem proper to secure either that object or other public or private rights.** Thus, the reservation of power to amend or repeal authorizes acts substantially changing the powers granted; the grant of additional powers auxiliary to the original design, and the requirement that such powers shall be exercised, and also authorizes the modification or restriction of powers, the increase of burdens, and the withdrawal of privileges of exemptions already granted, the repeal of the charter, and even the substitution of an entirely new charter."

12 Corpus Juris, page 1027, Citing

Berea College vs. Kentucky, 211 U. S. 45; 29 S. Ct. 33; L. ed. 81;

Wright vs. Minnesota Mut. L. Ins. Co., 193 U. S. 657; 24 E. Ct. 549; L. ed. 832.

Close vs. Glenwood Cemetery, 107 U. S. 466; 2 S. Ct. 267; 27 L. ed. 408;

Looker vs. Maynard, 179 U. S. 46; 21 S. Ct. 21; 46 L. ed. 79;

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Union Pac. R. Co. vs. Mason City, etc., R. Co., 128 Fed. 230; 64 C. C. A. 348 (O. 124 Fed. 409, and Off. 199 U. S. 160) 26 S. Ct. 19; 50 L. ed. 134;

G. H. Venner Co. vs. U. S. Steel Corp. 116 Fed. 1012;

Santa Clara County vs. Southern Pac. R. Co. 18 Fed. 385 (Off. 118 U. S. 394, 417, 6 S. Ct. 1132, 1144, 30 L. ed. 118, 125);

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Arkansas Store Co. vs. State, 94 Ark. 27; 125 S. W. 1001; 40 Am. S. R. 103; 27 L. R. A. N. S. 255.

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Inland Fisheries vs. Holyoke Water Power Co. 104 Mass., 446; 6 A. M. R. 247;

Peo. vs. Grand Blane, etc., Plank Road Co., 10 Mich. 400;

Cregg vs. Granby Min. etc., Co. 164 Ms. 616; 65 S. W. 312.

Lewis vs. Northern Pac. R. Co. 36 Mont. 207; 92 P. 469.

Berger vs. U. S. Steel Corp. 63 N. J. Eq. 909; 53 A. 68;

New York Cent. etc., R. Co. vs. Williams, 199 N. Y. 108; 92 N. E. 404; 139 AM. S. R. 850; 38 L. R. A. N. S. 539; (Off. 136 App. Div. 904 Mem. 120 N. Y. S. 1137 Mem. (Off. 64 Misc. 15, 116 N. Y. S. 765);

Union Hotel Co. vs. Hersee, 79 N. Y. 454; 35 Am. R. 536;

Peo. vs. Boston, etc., R. Co. 70 N. Y. 569.

Globe vs. Erie County Mut. Ins. Co. 39 App. Dis. 183; 57 N. Y. S. 290; (Off. 169 N. Y. 613 Mem. 62 N. E. 1096 Mem.);

Hyatt vs. Esmond, 37 Barb. 457;

Hyatt vs. McMahon, 25 Barb. 457;

Harper vs. Andst, 32 Ohio St. 29;

Ware Shoals Mfg. Co. vs. Jones, 78 S. C. 211; 58 S. E. 811;

Harlotte, etc., R. Co. vs. Giffes, 27 S. C. 385; 4 S. E. 491;

La Crosse vs. La Crosse Gas, etc., Co. 146 Wis. 408; 130 N. W. 530.

(This was the substitution of an entirely new charter; to-wit, an indeterminate franchise.)

"It may be safely affirmed that the reserved power may be exercised to almost any extent **to carry into effect the original purpose of the grant,** or to secure an administration of its affairs so as to protect the rights of the stockholders and creditors, **and for the proper disposition of its assets.**"

7 R. C. L., Page 118.

Miller vs. New York, 15 Wall, 478; 21 U. S. (L. ed.) 96.

If that is the test as to the proper construction, or if it is to be considered in determining what is the proper construction or effect of the so-called reserve power provision in the Wisconsin constitution in order to carry into effect the original intent or purpose of the framers of the constitution then surely there should be no question but what the intent of the framers of the Wisocnsin constitution was to do away entirely with the rule of the Dartmouth College case in all public grants in Wisconsin, and the construction of the state courts as to what that intent was and the purpose of its adoption as a part of the fundamental law of the state should have large weight if not controlling effect in this court, because it is a construction of the provisions of the state constitution and not the Federal constitution.

Under the reserve power to repeal, the legislature may even terminate the corporate existence.

7 R. C. L., pag 122; Citing

Siegel vs. O'Brien, 111 N. Y. 1; 18 N. E. 692; 7 A. S. R. 684; 2 L. R. A. 255.

Greenwood vs. Union Freight Co., 105 U. S. 13; 26 U. S. (L. ed.) 961.

Hamilton Gas Light and Coke Co. vs. Hamilton City, 146 U. S. 248; 13 S. Ct. 90; 36 U. S. (L. ed.) 963.

Inland Fisheries Com'rs vs. Holyoke W. Co., 104 Mass. 446. 6 Am. Rep. 247.

Maynard vs. Looker, 111 Mich. 496; 69 N. W. 929; 56 L. R. A. 747; 179 U. S. 46.

N. Y. Cent. & H. R. R. Co. vs. Williams, 199 N. Y. 108; 92 N. E. 404; 139 A. S. R. 850; 35 L. R. A. (N. S.) 549.

Noble State Bank vs. Haskill, 219 U. S. 104; 31 S. Ct. 186.

State vs. Brown, etc., N. F. Co., 18 R. I. 16; 26 A. T. L. 246.

Lord vs. Equitable Life Assoc. Soc. of U. S., 194 N. Y. 212; 78 N. E. 443; 22 L. R. A. (N. S.) 420.

In the constitution of California it was provided that "Corporations may be formed under general laws but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed," and it was held the effect of that provision was **"to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interests should at any time require such interference * * * The reservation affects the entire relation between the state and the corporation and places under legislative control all rights, privileges and immunities derived by its charter directly from the state."**

Tomlinson vs. Jessup, 15 Wall. 434.

The attention of the court is especially called to the fact that the language of the California construction there construed is in legal effect the same, and most of it is in the exact words of the Wisconsin Constitution.

A statute conferring on cities the power to authorize the construction and operation of street railways and to grant rights of way to such railways and to regulate them and authorize the city to make contracts necessary to carry out the powers granted, was held not to be construed as empowering the city to make a contract irrevocable against the state.

City of Helena vs. Helena Light & Railway Co., 207 P. 337.

Tulars Co. vs. City of Dinuba, 206 Pac. 938.

That was a very mild form of reservation.

Under a reservation of power the legislature may repeal the charter of a corporation without the consent of the corporation and may pass laws which will modify their charters

materially, and if such amendments are passed, compulsory, and are not mere offers of amendments to the corporation, the corporation must accept and act under them or discontinue business.

7 R. C. L., Page 118.

Zabriskie vs. Haskansack, etc., R. C., 18 N. J. Eq. 178; 90 Am. Dec. 617.

The constitutional power of the legislature to alter, amend or repeal the charter of a corporation under a reserved power to do so is undoubted and the scope of legitimate action under such reserve power is very broad.

7 R. C. L., page 118.

Greenwood vs. Union Freight Co., 105 U. S. 13; 26 U. S. (L. ed). 961.

Hamilton Gas Light & Coke Co. vs. Hamilton City, 146 U. S. 258; 13 S. Ct. 90; 36 U. S. (L. ed.) 916.

Inland Fisheries Com'rs. vs. Holyoke Water Power Co., 104 Mass. 446; 6 Am. Rep. 247.

Maynard vs. Looker, 111 Mich. 498; 69 N. W. 929; 54 L. R. A. 947; 179 U. S. 46.

N. Y. Cent. & H. R. R. Co. vs. Williams; 199 N. Y. 108; 92 N. E. 40 4;139 A. S. R. 850; 35 L. R. A. (N. S.) 549.

Noble State Bank vs. Haskill, 219 U. S. 104; 31 S. Ct. 186.

State vs. Brown, etc., M. L. G. Co., 18 R. I. 16; 25 A. T. L. 246; 18 L. R. A. 856.

Lord vs. Equitable Life Assur. Co. of U. S. 194 N. Y. 212; 87 N. E. 443.

Where the right is reserved to the state or its municipalities to regulate rates, this power may properly be exercised without thereby impairing the obligation of contracts.

7 R. C. L., page 120.

Freeport Water Co. vs. Freeport, 180 U. S. 587; 21 S. Ct. 493; 45 U. S. (L. ed.) 679.

Knoxville Water Co. vs. Knoxville, 189 U. S. 434; 23 S. Ct. 531; 47 U. S. (L. ed.) 887.

Omaha Water Co. vs. Omaha, 147 Fed. 1.

Somerville vs. St. Louis Min. Co., 46 Mont. 268; 127 Pac. 464.

Home Telephone and Telegraph Co. vs. Los Angeles, 211 U. S. 265 and cases.

"After the Dartmouth College Case which established the contractural nature of corporate charters, the general practice arose, following the suggestion of Justice Story in his concurring opinion in that case, on the part of the several states in the grant of corporate charters to reserve the right to alter, amend or repeal the charter, **and it is now settled that such a reservation is not repugnant to the grant but is a valid limitation upon the powers and privileges granted.**"

7 R. C. L., page 115, citing

Jefferson College vs. Washington & Jefferson College, 13 Wall. 190; 20 U. S. (L. ed.) 550.

Tomlinson vs. Jessup, 15 Wall. 454; 21 U. S. (L. ed.) 204.

Miller vs. New York, 15 Wall 478; 21 U. S. (L. ed. 60.

Holyoke vs. Lyman, 15 Wall. 500; 21 U. S. (L. ed.) 133.

Wisconsin vs. Stone, 94 U. S. 181; 24 U. S. (L. ed.) 102.

Sinking Fund Cases, 99 U. S. 700; 25 U. S. (L. ed.) 496.

Gibbs vs. Consolidated Gas Co. of Baltimore, 138 U. S. 396; 9 S. Ct. 443; 32 (L. ed.) 979.

Hamilton Gas Light, etc., Co. vs. Hamilton, 146 U. S. 258; 13 S. Ct. 90, 36 U. S. (L. ed.) 963.

St. Louis, etc., Ry. Co. vs. Paul, 173 U. S. 404; 19 S. Ct. 419; 43 U. S. (L. ed.) 746, affirming 64 Ark. 83; 40 S. W. 705; 62 S. S. 154; 37 L. R. A. 504.

Citizens' S. Bank vs. Owensboro, 173 U. S. 636; 9 S. Ct. 530; 571; 43 U. S. (L. ed.) 840.

Howard Packing Co. vs. Arkansas, 212 U. S. 322; 29 S. Ct. 370; re U. S. (L. ed. 5)30; 15 Ann. Cos. 645.

Missouri Pac. Ry. Co. vs. Kansas, 216 U. S. 262; 30 S. Ct. 330; 54 U. S. (L. ed.) 472.

Leep vs. St. Louis, etc., Ry. Co., 58 Ark. 407; 25 S. W. 75; 41 A. S. R. 109; 23 L. R. A. 264.

Arkansas Stone Co. vs. State, 94 Ark. 27; 125 S. W. 1001; 140 A. S. R. 103; 27 L. R. A. (N. S.) 255.

Southington Water Co. 80 Conn. 646; 69 Atl. 1023; 13 Ann. Cos. 411.

Danville vs. Danville Water Co., 178 Ill. 299; 53 N. E. 118; 69 A. S. R. 304.

Miners' Bank of Dubuque vs. U. S. Morris, (Ia.) 482; 43 Am. Dec. 115; note.

Griffin vs. Kentucky Ins. Co. 3 Bush (Ky.) 592; 96 Am. Dec. 259.

Deposit Bank of Owensboro vs. Daniess County, 102 (Ky.) 174; 39 S. W. 1030; 44 L. R. A. 825.

Webster vs. Susquehanna Pole Line Co., 122 Md. 416; 76 Atl. 254; 21 Ann. Cas. 257.

Creose vs. Babcock, 23 Pick. (Mass.) 334; 34 Am. Dec. 61.

Maynard vs. Looker, 111 Mich. 498; 69 N. W. 929; 56 L. A. 947.

Watson Seminary vs. Pike Co. Court, 149 Mo. 57; 50 S. W. 880; 45 L. R. A. 675.

Story vs. Jersey City, etc., Plank Road Co., 16 N. J. Eq. 3; 84 Am. Dec. 134.

Zahrishes vs. Hackensack, etc., R. Co., 18 N. J. E. 178; 90 Am. Dec. 617.

McCarter vs. Hudson County Water Co. 70 N. J. Eq. 697; 65 Atl. 489; 118 A. S. R. 754; 10 Am. Cos. 116; 14 L. R. A. (N. S.) 197.

State vs. Miller, 80 N. J. L. 368; 86 Am. Dec. 1881.

State vs. New Jersey, 31 N. J. L. 576; 86 Am. Dec. 240.

Shallow vs. Erie R. Co. 73 N. J. L. 558; 86 Atl. 403; 118 A. S. R. 704; 9 Ann. Cos. 883; 9 L. R. A. (N. S.) 727.

Lord vs. Equitable Iife Assoc. Soc. of U. S. 194 N. Y. 420; 87 N. E. 443; 22 L. R. A. (N. S.) 420.

Wagner Free Inst. vs. Philadelphia, 132 Pa. St. 612; 19 Atl. 297; 19 A. S. R. 613.

State vs. Brown, etc., Ffg. Co., 18 R. I. 16; 25 Atl. 216; 17 L. R. A. 856.

Lawrence vs. Rutland R. Co. 80 U. S. 370; 60 Atl. 1091; 13 Ann Cos. 475; 15 L. R. A. (N. S. 350.

Notes in 43 Am. Dec. 118 and 53 Am. Dec. 469.

The Wisconsin Constitution was adopted after the decision of the Dartmouth College Case and was drawn by leading lawyers and judges of the supreme court of the territory, and as stated in several of the later decisions of the state court cited in the motion, brief and in the opinion of the state court, (T. of R. 46) the reserve power in Sec. 1 of Art XI was put into the state constitution to reserve to the state the control over corporate charters, rights, and franchises in accordance with the suggestion of Justice Story in his concurring opinion in the

Dartmouth College Case, and to give the state control over corporations of its own creation. It is idle to argue that it was not intended to do away entirely in Wisconsin with the limitation and rule of the Dartmouth College Case just as it was suggested it could be done in Justice Story's opinion, and it should be given that effect, especially as to this corporation, which was given and accepted both its charter and franchise and all of its property rights under and subject to such reserve power as construed by the state court.

The so-called reserve power in Section 1, Article XI of the state constitution should be construed with reference to the conditions and customs existing at the time of its adoption, which discloses the purpose of the provision. Such existing conditions and customs are disclosed in the case of the Madison, Watertown and Milwaukee Plank Roaod Co. vs. Reynolds, 3 Wis. 287, which shows that the then custom was that corporations were created by direct act of the legislature, and in the same act the corporation was given the right to build and operate plank roads, which was the purpose of its creation. Applying that act to modern customs the legislature then granted both the charter and franchise rights, so-called, by the same act and when this so-called reserve power provision was drawn it was so drawn with reference to such prevailing custom or condition and intended to cover both charter and franchise rights as they were then granted by direct act of the legislature; and the fact that the legislature afterwards changed that custom and for convenience delegated the so-called franchise power to municipalities, and afterwards withdrew it, should not change the original purpose and intent of the act and it should be construed as the state court construed it with reference to customs and conditions existing at the time of its adoption.

The constitution of of New York, Art. VIII, Sec. 1, provides that corporations may be formed by special act and that all acts so passed may be altered or repealed. The Platt Institute was created by charter from the state and given certain exemptions from taxations; subsequently the act was amended repealing the exemption provisions in the charter and it was

held, the law was valid under the reserve power in the state constitution.

Platt Institute vs. N. Y., 91 N. Y. Sup. 136; 99 App. Div. 525.

Citing Cooley on Constitutional Lim. (7th Ed.) 396.

An amendment to a statute making stockholders of a bank liable for public funds deposited therein was held not unconstitutional as to an existing bank where the statute previously provided that the legislature may alter or revoke charters in such a manner that no injustice be done the corporation.

Bank of Blytheville vs. State, 230 S. W. 55.

The claim of the plaintiff in error that the reserve power in the Wisconsin Constitution was only intended to apply to so-called charter provisions and not to so-called franchise provisions are, we think, very clearly answered in the opinion of the state court. (T. of R. 46.)

The terms charter and franchise are used in the Wisconsin Constitution, laws and court decisions in about the same way that the same terms were used in the statutes of Georgia which was construed by this court in the case of Railroad Cos. vs. Georgia, 98 U. S. 359, which is referred to in the decision of the state court. (See T. R. 53.) The statute of Georgia provided that "in all cases of private charters hereby granted the state reserves the right to withdraw the franchise unless such right is expressly negatived in the charter," and this court there said, "No such right was negatived in the charter granted to the plaintiff in error, consequently the charter granted to the plaintiff in error was held subject to the power in the state to withdraw it and subject to be changed, modified or destroyed at the will of its grantor or creator. These provisions of the code became in substance a part of the charter. It is quite too narrow a definition of the word "franchise" used in this statute to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the

legislature as the greater power includes every lesser power which is a part of it. The right to withdraw a franchise must authorize a withdrawal of every and any right or privilege which is a part of the franchise." The words franchise and charter are there used interchangeably. That is the theory of the reserve power in the constitution and statutes of Wisconsin as construed by the decisions of the state court under which the plaintiff in error sought and obtained its rights and existence.

EMINENT DOMAIN.

Where there is no reserved power in the government to take back, amend or revoke a franchise as a contract right, then the franchise is a property right and like any other property or property right may be taken under the power of eminent domain for public use upon payment of just compensation which is determined under the Wisconsin law by the Railroad Commission the same as the other property of the corporation.

The charter of a corporation and all of its franchises received directly or indirectly from the state are property and property rights and like all other property and property rights are subject to the power of eminent doman in the state, and all the property of the corporation, including its franchise, may be taken under that power for public uses like the property of individuals without violating any of the obligations of contracts.

12 Corpus Juris 1041, citing

Long Island Water Light Company vs. Brooklyn, 166 U. S. 685; 17 S. Ct. 718; 61 L. Ed. 1165.

Monongahela Nav. Co. vs. U. S. 148, U. S. 312. (This decision holds that it is not necessary that such franchises should be taken and appraised like land.)

Greenwood vs. Union Freight Co. 125 U. S. 13; 26 (L. ed.) 961.

Richland, etc., R. Co. vs. Louisa R. Co., 13 How. 71; 14 (L. ed.) 55.

Western River Bridge Co. vs. Dix, 6 How. 507; 12 (L. ed.) 535.

Alabama, etc., R. Co. vs. Kenney, 39 Ala. 307.

Indian Canon Co. vs. Robinson, 13 Cal. 519.

Boca, etc., R. Co. vs. Sierra Valley R. Co., 2 Cal. A. 546; 84 P. 298.

State vs. Suffield, etc., Bridge Co., 81 Conn. 56; 70 A. 56.

New York, etc., R. Co. vs. Boston, etc., R. Co., 36 Conn. 196.

East Hartford vs. Hartford Bridge Co., 17 Conn. 79; 16 Conn. 149.

Enfield Toll Bridge Co. vs. Hartford, etc., R. Co., 17 Conn. 40; 42 Am. D. 716; 17 Conn. 54; 44 Am. D. 556.

Shorter vs. Smith, 9 Ga. 517.

Hyde Park vs. Oakwoods Cemetery Assoc., 119 Ill. 141; 7 N. E. 627.

East St. Louis Union R. Co., 108 Ill. 265.

Lake Shore, etc., R. Co. vs. Chicago, etc., R. C., 97 Ill. 506.

St. Louis, etc., R. Co. vs. Springfield, etc., R. Co., 96 Ill. 274.

Metropolitan City R. Co. vs. Chicago City R. Co., 87 Ill. 317.

Chicago, etc., R. Co. vs. Lake, 71 Ill. 333.

Illinois, etc., Canal vs. Chicago, etc., R. Co., 14 Ill. 314.

Terra Haute vs. Evansville, etc., R. Co., 149 Ind. 174; 46 N. E. 77; 37 L. R. A. 189.

Crossley vs. O'Brien, 24 Ind. 320; 87 Am. D. 329.

Lafayette Plank Road vs. New Albany, etc., R. Co. 13 Ind. 90; 74; Am. D. 246.

Kennebec Water Dist. vs. Waterville, 96 Me. 234; 52 A. 774; 97 Me. 185; 54 A. 6, 60 L. R. A. 856.

State vs. Noyes, 47 Me. 189.

Baltimore, etc., Turnpike Road vs. Baltimore, etc., Pass. R. Co., 81 Md. 247; 31 A. 854.

Baltimore, etc., Turnpike Co. vs. Union R. Co., 35 Md. 224; 6 A. M. R. 397.

Bellana Cas. Case, 3 Bland 442.

Eastern R. Co. vs. Boston, etc., R. Co., 111 Mass. 125; 15 Am. R. 13.

Haverhill Bridge Prop. vs. Essex Co., 103 Mass. 120; 4 A. M. R. 518.

Proprietors Merrinse River Locks, etc., vs. Lowell, 7 Gray 222.

Central Bridge Corp. vs. Lowell, 4 Gray 474.

Boston Water Power Co. vs. Boston, etc., R. Corp. 23 Pick 360.

Toledo, etc., R. Co. vs. Detroit, etc., R. Co. 62 Mch. 564; 29 N. W. 500; 49 M. S. R. 875.

East Saginaw Mfg. Co. vs. East Saginaw, 19 Mich. 259; 2 A. M. R. 82 684; 84 A. M. S. R. 717; 51 L. R. A. 936.

Kansas, etc., Coal R. Co. vs. N. W. Coal, etc., Co., 161 Mo. 288; 61 S. W.

Crossby vs. Hannover, 36 N. H. 404.

Northern R. Co. vs. Concord, etc., R. Co. 27 N. H. 183.

Backus vs. Lebanon, 11 N. H. 19; 36 Am. D. 46.

Peerce vs. Somersworth, 10 N. H. 369.

Barber vs. Andover, 8 N. H. 396.

Piscatoqua Bridge vs. New Hampshire, 7 N. H. 35.

Block vs. Delaware, etc., Canal Co., 24 N. J. Eq. 455.

New York Cent., etc., R. Co. vs. Metropolitan Gas Light Co., 63 N. J. 326.

Matter of Long Island Water Supply Co., 73 Nun. 499; 26 N. Y. S. 196. (Aff. 143 N. Y. 596; 38 N. E. 983 (Off. 166 U. S. 685; Mem. 17 S. Ct. 718; Mem. 4 (L. ed.) 1165.

Sixth Ave. R. Co. vs. Kerr, 451 Barb. 138 (Off. 28 How. Pr. 382. Aff. 72 N. Y. 330).

In re Kerr, 42 Barb. 119.

Miller vs. New York, etc., R. Co., 21 Barb. 513.

North Carolina, etc., R. Co. vs. Cordoina Cent. R. Co., 83 N. C. 489.

Kinsman St. R. Co. vs. Broadway, etc., St. R. Co., 36 Ohio St. 239.

Oregon Casoard R. Co. vs. Baily, 3 Or. 164.

Philadelphia, etc., Pass R. Cos. Opp. 102 Pa. 123.

In re. Towanda Bridge Co., 91 Pa. 216.

Com. vs. Penn. Canal Co., 66 Pa. 41; 5 Am. R. 329.

Philadelphia, etc., R. Cos. App. 2 Walk. 291; 1 Mont. Co. 129.

Ex. P. Girard College, 31 Leg. Int. 164.

Lewis vs. Germantown, etc., R. Co. 16 Phila. 621.

Union Pass. Ry. Co. vs. Continental R. Co., 11 Phila. 321.

Emery vs. Chicago, etc., R. Co., 35 S. D. 583; 153 N. W. 655.

Nashville, etc., Turnp. Co. vs. Davidson County, 106 Tenn. 258; 61 S. W. 68.

Red River Bridge Co. vs. Clarksville, 1 Sneed, 176; 60 Am. D. 143.

White River Turnpike Co. vs. Vermont Cent. R. Co., 21 Vt. 590.

West River Bridge Co. vs. Dix, 16 Vt. 446; (Off. 6 How. (U. S.) 507; 12 (L. ed.) 535.

Armington vs. Barnet, 15 Vt. 745; 40 Am. D. 705.

Northfold, etc., R. Co. vs. Virginia R. Co., 110 Va. 631; 66 S. E. 864.

Tait vs. Central Lunatic Ass., etc., vs. Thompson, 3 Gratt (44 Va.) 43; 36 Am. D. 374.

In the note to 12 Corpus Juris 1041 the reasons for that rule are given as follows:

(1). The right of eminent domain is an element of sovereignty and a contract in restraint of a free exercise of this right is not obligatory on the state and does not fall within the inhibition of the constitution of the United States. Per Crag. J. in Hyde Park vs. Oakwoods Cemetery Assoc. 119 Ill. 141; 146 N. E. 627.

(2). The rule rests on the basis that public convenience and necessity are of paramount importance and obligations to which when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held in a measure and to a certain extent subordinate. By the grant of a franchise to individuals for one public purpose the legislature does not forever debar itself from giving to others new and paramount rights and privileges when required so to do by public exigencies, although it may be necessary in the exercise of such rights and privileges to take and appropriate a franchise previously granted. If such were not the rule great public improvements rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered

obsolete." Citing Central Bridge Corp. vs. Lowell, 4 Gray (Mass.) 474-481.

(3). **"This right of eminent domain may be exercised by the state even though the powers of the corporation are thereby suspended or the corporation actually dissolved."**

12 Corpus Juris 1043.

Backus vs. Lebanon, 10 N. H. 19; 35 Am. D. 466.

But as in all other cases of the taking of property under the power of eminent domain, adequate compensation must be made to the owner or the taking will be unconstitutional.

12 Corpus Juris 1042; citing inter alia Long Island Water Supply Company vs. Brooklyn, 166 U. S. 685; 17 S. Ct. 718; 41 (L. ed.) 1165.

The Wisconsin statutes involved and which are cited and analyzed in the city's brief on the motion to dismiss and in the opinions of the state court (T. of R. 42 and 63) do not offend against this rule because they provide for the condemnation and appraisal of all of the property and property rights of the company which would include franchise rights, if any, going value and whatever things of value attach thereto, and all elements of value are appraised together as the property of the utility necessary and useful for the convenience of the public. So if there is any property in this franchise under the reserve power it is taken as such in the proceeding before the commission. That this theory of the law is the rule of both the courts and the Railroad Commission of Wisconsin is clearly shown in the case of Neenah vs. Wisconsin Tr. Lt. H. & P. Co., 15 Wis. R. C. R. 626, and in the cases there cited where the railroad commission after referring to the fact that in a number of states by statutory provision franchises were valued for assessment purposes as separable items of property, the Commission of Wisconsin there says: "In Wisconsin, this distinction was never entered into by the legislature, and the supreme court, while recognizing the right of the legislature to so distinguish, has always held that the physical and intangible

items of property should be considered as an entirety. This matter has been brought before the court in taxation cases and has been uniformly decided in the manner indicated above. See State ex rel Milwaukee St. R. Co. vs. Anderson, 90 Wis. 550; State ex rel, Ashland Water Co. vs. Wharton, 115 Wis. 457; Chicago & N. W. R. Co. vs. State, 128 Wis. 553; Fond du Lac Water Co. vs. Fond du Lac, 82 Wis. 322; Monroe Water Works Co. vs. Monroe, 110 Wis. 11; Yellow R. Imp. Co. and another, 81 Wis. 554. * * * In Chicago & N. W. R. Co. vs. State, 128 Wis. 553 ,the court decided that the value of railway property for taxation purposes was not to be considered as an addition of physical to intangible value, but the value of the property as a unit. In Washburn vs. Washburn W. W. Co. 120 Wis. 575, 585, the court, after referring to a number of cases in which this question had been considered, said: "An examination of these and other cases decided here, that might be referred to, shows that it has been as firmly established as anything can be by judicial determination, that all the property of a public service corporation, such as appellant, street and other railway companies, and public lighting companies, whether real, personal or mixed, in the ordinary sense of those terms, **including franchises other than the mere right to be a corporation, is one entire indivisible thing; that all the parts partake of the nature of the franchise from which springs the public duty, and as that is deemed to be personalty, all should be regarded as such. In that view it would be the height of absurdity to consider value and impose a tax upon one part of such entire thing separate from the rest. There can be no separation without destruction.** Therefore, the separate value of the parts in the aggregate would not necessarily approximate to or be any legitimate measure of the value of all the parts, viewed as one complete machine, so to speak. The franchise by itisIf would be valueless. The plant in its parts as realty and personalty according to the character thereof, irrespective of the combination of all into one entire thing, might be of little value, and probably would be as compared to what they would represent in the new form produced by the union of many parts into one." * * * The legislature, however, has expressed itself as favoring the treating of the property as an entirety. * * * The Supreme Court of the state has interpreted the

intent of the legislature as expressed in the public utility statutes as against the separation of tangible and intangible elements in municipal purchase and other cases. In connection with the indeterminate feature of the law and the assignability of the same, that court said in Calumet Service Co. vs. Chilton, 148 Wis. 334, on page 352: The Wisconsin Electric Service Company, as found on the 21st day of December, 1907, became the owner of a 'license, permit or franchise,' call it what we may, from the state, characterized in the public utility law as an indeterminate permit, of the scope, as regards the privilege feature, of the Bink franchise, as herein determined. The physical things in use in connection therewith, and the existing business to which the privilege was referable, all become, by operation of law, merged in the single thing, the public utility property. The franchise, in such circumstances, is the principal thing, and, in general, is inseparable from the rest. The latter really partakes of the nature of the former." Citing Washburn vs. Washburn W. Co., 120 Wis. 575; 98 N. W. 539; Chicago & N. W. R. Co. vs. State, 128 Wis. 553, 619; 108 N. W. 557.

In that case the Railroad Commission of Wisconsin in fixing valuation of the property of the plaintiff in error for rate making valued franchises, charters and grants at $1,000,000.00, as shown in the tables on pages 718 and 730 of Value, 10 Wis. R. C. R.

"In the Appleton Water Works Case, which involved the matter of municipal acquisition, the court, in connection with the allowance made by this Commission for the "going value" of the plant, said: 'The value of the plant and business is an indivisible gross amount. It is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all not as separate things, but as inseparable parts of one harmonious entity and exercising the judgment as to the value of that entity."

Appleton W. W. Co. vs. R. R. Comm., 154 Wis. 121 148.

"Under the Public Utilities Law a municipality can only terminate a franchise or indeterminate permit when it determines to acquire the plant of the public utility and then it must pay just compensation for the property as a going concern.

Even if the city could lawfully condemn the franchise of the company, it would not be benefited thereby to any material extent. As the franchise is essential to the operation of the property any damage for taking such franchise separate and apart from the property would, under any valid law, result in requiring the municipality to pay the difference in the value of the property, including the franchise before and after the taking of the franchise."

City of Neenah vs. Wis. Tr. Lt. H. & P. Co., 15 W. R. C. R. 626-630.

That case shows very clearly the rule of the Wisconsin Railroad Commission and state court in valuing all property and property rights together.

"The power of eminent domain is paramount to the right secured by the obligation of the contract clause, and its exercise in no wise interferes with the inviolability of contracts. The constitutional inhibition on any state law impairing the obligation of contracts is not a limitation on the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exercise of power neither challenges its validity nor impairs its obligations. It is a taking and not an impairment of its obligations. The property of a corporation, including its franchise, may be taken for public use if the public exigencies require it for that purpose, even if such taking incidentally puts an end to the corporate powers by leaving nothing with respect to which they may be exercised. The grant of a franchise confers no more sacred title than a grant of land to an individual, and when the public necessities require it, the one as well as the other may be taken for public purposes on making compensation; nor does such an exercise of

the right of eminent domain interfere with the inviolability of contracts."

6 R. C. L., Page 330. Section 322, citing

West River Bridge Co. vs. Dix, 6 How. 507; 12 U. S. (L. ed.) 335.

Spencer vs. Seaboard Air Line R. Co., 137 N. C. 107; 49 S. E. 96; 1 L. R. A. (N. S.) 604.

Planters Bank vs. Sharp, 6 How. 301; 12 U. S. (L. ed.) 447.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; 17 S. Ct. 718; 41 U. S. (L. ed.) 1165.

New Orleans Gas Light Co. vs. Louisiana Light & Heat Producing and Mfg. Co., 115 U. S. 650; 6 S. Ct. 252; 29 U. S. (L. ed.) 516.

Enfield Toll Bridge Co. vs. Hartford & M. H. R. Co., 17 Conn. 40 42 Am. Dec. 716.

Backus vs. Lebanon, 11 N. H. 19; 35 Am. Dec. 466.

Richmond F. & P. R. Co. vs. Louisa R. Co., 13 How. 71; 14 U. S. (L. ed.) 55.

The Wisconsin statutes, Section 1797m79-3, expressly provide for and give full effect to the principles of law above stated as they expressly provide that "any municipality shall have the power to acquire by condemnation the property of any public utility wherever situated used and useful for the convenience of the public, operating at the time this law takes effect." So, if there is any franchise or franchise right now owned by the plaintiff company which is property, whether you call it a franchise or going value, it is all to be valued by the Railway Commission acting under that statute, and the company can enforce all of its rights under that law.

Neenah vs. Wis. T. L. H. & P. Co., 15 Wis. R. C. R. 626 and cases there cited.

The power to fix rates for public service is governmental

and continuing and can not be delegated or surrendered without clear and unmistakable authority and every presumption is against it.

Home Telephone and Telegraph Co. vs. Los Angeles, 211 U. S. 265.

Under the constitution and the statutes as construed, both the public and corporate rights are protected. "Although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporation."

Southern Iowa Electric Co. vs. Charlestown, 222 U. S. 539-54 and cases cited.

If the state could destroy the property of a public utility by fixing too low rates it could so take property without compensation, but in a taking under either the reserve power in the constitution or under the power of eminent domain in the administration of the Railroad Commission law, the equivalent of the property and property rights and franchises, if any, is paid to the owner as fixed by the railroad commission that no legal wrong can be done to either party, and if the valuation as determined by the railroad commission is thought to be insufficient or is not determined upon a proper basis or in a proper manner the remedy is given by the railroad commission law to review and correct any error by appeal action in the courts. Section 1797m83.

In this brief we have tried as much as possible to not repeat what was expressly covered by the motion brief but, in closing we can not refrain from again referring to and quoting from the decision of this court in the case of Long Island Water Supply Co. vs. Brooklyn, 17 Sup. Ct. Rep. 718, where the court says, "It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it; **all may be taken for public use upon pay-**

ment of just compensation. * * * The contract is a mere incident to the tangible property. A contract is property and like any other property may be taken under condemnation proceedings for public use. * * * The true view is that the condenmation proceedings do not impair the contract, do not break its obligations, but appropriate it as they do the tangible property of the company to public use. * * * In other words, the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value. * * * This power denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government. * * * Every contract is made in subordination to them and must yield to their control as conditions inherent and paramount wherever a necessity for their execution shall occur. * * * We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property. A franchise is property and nothing more."

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; 17 Sup. Ct. Rep. 718.

Contributors to Penn. Hosp. s. Philadelphia et. al, 245 U. S. 20; 38 Sup. Ct. Rep. 35.

The objections raised to the jurisdiction and power of the city to acquire, hold and operate that part of the plant located in Minnesota is, we think sufficienlty answered in the opinion of the state court on the rehearing (T. of R. 63) and in the brief of the city on the motion to dismiss on page 34 et. seq.

All other objections are, we think, sufficiently covered by the opinions of the state court and the other brief.

We submit that under the established rules of law both by the state and federal decisions under the reserved power in the Wisconsin Constitution the provisions in the Wisconsin Railway Commission law which authorize and permit the city to acquire all of the property and property rights of the plaintiff Water Company, by paying their appraised value are valid, and the city should be allowed to proceed under that law;

but we further submit that if that part of the law is unconstitutional yet under the law of eminent domain, which is recognized by the state, and can be enforced by the Railroad Commission under that law (the necessity for the taking having been found by a jury) the right of the city to condemn and take the property and property rights, including franchise rights and all other rights of the company, except its right to be a corporation is unquestionable; and we confidently assert that the Water Company will, in the proceeding before the Railroad Commission, receive full compensation, which will be the equivalent in money, for of all its property and property rights of whatsoever kind, character and description; and we respectfully submit that either the motion of the city to dismiss this action should be granted or the decision of the state supreme court should be affirmed by other proper decree in this court.

Respectfulyy submitted,

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L. HANITCH, of Counsel.

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Younkin vs. Milwaukee L. H. & T. Co., 120 Wis. 477 (42).

United States Supreme Court

October Term 1922

No. 436

SUPERIOR WATER, LIGHT & POWER COMPANY,

Plaintiff in Error,

vs.

CITY OF SUPERIOR AND F. A. BAXTER, AS MAYOR; AND C. N. O'HARE AND F. C. TOMLINSON, AS COMMISSIONERS OF THE CITY OF SUPERIOR,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

MOTION TO DISMISS.

This is a motion to dismiss this action for want of merits because the constitutional questions involved have been repeatedly decided and the rules of law clearly established by this court against the claims of the plaintiff in error, and for that reason, there is no unsettled Federal question involved, on the grounds, first, that the power to alter and amend charters and franchises was expressly reserved in the state constitution, and second, because franchises are property and property rights are subject to condemnation under the laws of eminent domain the same as other properties. (See motion at end of this brief.)

SATEMENT OF FACTS.

This case comes to this court on a writ of error from the final decision of the Supreme Court of the State of Wisconsin in a mandatory injunction action to enjoin the defendant City of Superior from proceeding before the Railroad Commission of Wisconsin to condemn, appraise and take over the water plant of the plaintiff in error under the provisions of Sections 1797m-1 to 1797m-108 of the Wisconsin statutes known as the Railroad Commission Law, and to compel the defendants in error to take over and purchase said water plant under the terms of its thirty-year franchise because the city failed to renew the franchise for another thirty years at the end of its first frnachise term in accordance with the provisions of such franchise. Before the end of the first thirty-year franchise term the legislature of Wisconsin passed what is known as the Railroad Commission law, which prohibited the granting of term franchises in the future and made all such franchises indeterminate permits. That law was passed under the reserved power in the state constitution, Section 1, ArticleXI., which provides, "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. "All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

The plaintiff in error has made seven specific assignments of error in the decision of the state court denying its petition for a mandatory injunction, but the only Federal question involved in the case is the right of the legislature under the reserve power in the constitution or under the law of eminent domain to pass the so-called Railroad Commission law changing term franchises into indeterminate permits with authority of the municipality to acquire its property for public use.

The plaintiff in error is a private corporation and was organized in 1866 by a special act of the legislature of Wisconsin for the purpose of furnishing water to the then Town of Superior and its neighborhood, and was given power to lay

its pipes in the streets and to furnish water to the municipality and its inhabitants. (T. P. 6.) The Town of Superior formerly covered the same territory as Douglas County, being the Northwesterly point of Wisconsin. The Village of West Superior, called in the complaint, Superior, was created in 1887 out of the Northwesterly part of the Town of Superior. (T. P. 7.) The City of Superior was created in 1889 by special charter, Chapter 152 of the Charter Laws of Wisconsin of that year, and included in the city the territory in the former Village of West Superior, and in addition, part of the Town of Superior, which composed the then Village of Superior. (T. P. 8.)

In 1887 the then Village of West Superior granted by its ordinance No. 1, a thirty-years franchise to the predecessor of the present plaintiff water company to furnish water to said village and its inhabitants. (T. P. 7-14.) And in that franchise it was provided that the village might buy the plant on certain stated dates at a stipulated price, and unless the municipality should renew the franchise for another thirty years at the end of said term, it should take over the plant at such stipulated price.

At first Wisconsin granted franchises by direct act of the legislature, then for many years, Wisconsin, like many other states, delegated to municipalities the power to grant franchises for certain public utility services, and under that practice it was not uncommon to have several franchises in force in the same municipality for furnishing the same kind of service, which naturally impaired the service of each company, and often long franchises were granted on terms and at fixed prices wholly out of proportion to the reasonable value of such services as they might develop during the term either by growth of the municipality, improvements in machinery, or changed conditions.

In 1907, to remedy this condition and other evils in that system, the legislature of Wisconsin passed Chapter 499 enacting Sections 1797m-1 to 1797m-108 of the Wisconsin Statutes, creating the Railroad Commission of Wisconsin, with extensive powers of regulation, supervision and control over all

public service corporations, and as a part of that plan, by Section 1797m-76, it prohibited the granting by municipalities of separate franchises in the future and provided that all franchises thereafter should be indeterminate permits and be under the jurisdiction of the Railroad Commission and with the right of the municipality to acquire the plant at any time by paying the reasonable value thereof; and in 1911 the legislature provided, by what is now Section 1797m-77, that all franchises granted prior to July 11, 1907, should, after the date named, be and were so altered and amended as to constitute and be involuntary, indeterminate permits within the meaning of that law, and the question involved in this case is the constitutionality of that provision.

ARGUMENT.

Section 10, Article 1, of the United States constitution provides that "no state shall * * * pass any * * * law impairing the obligation of contracts." The Dartmouth College case (4 Wheaton, 518) was decided in 1819. The State of Wisconsin was admitted in 1848 under a constitution which was drawn by a committee composed of Supreme Court Judges and leading lawyers of the territory, and from the history of that constitutional convention, and from the opinions in a number of the early decisions in the State court, it appears very clear that the provisions of Section 1, Article XI of the State Constitution were put into the State Constitution because of an intimation in the opinion of Justice Story in the Dortmouth College case, that if the power to amend and alter was reserved in the State Constitution, that the legislature would have the right to amend such charters or franchises thereafter granted, notwithstanding the prohibition in the Federal Constitution, and throughout the decisions of the state court, that has continued to be the attitude of the state court, as it appears very clear from the decisions cited in the opinion of the state court in this case. (Trans. P. 42.) The right to alter, amend or repeal is usually expressly reserved by the state or municipality in the act granting the right or privilege and when the franchise is accepted by the individual or corporation the reservation becomes a part of the contract and the franchise may be

amended by subsequent legislation. The right may be expressed in the act itself or in the constitution of the state. The effect is the same whether the right to amend is in the constitution, the grant itself, or in the general laws of the state.

2 McQuillen, Minn. Cor. 823, and cases.

While at the time of the granting of the franchise in question the legislature of Wisconsin had not yet acted under the reserve power in the State Constitution, yet, the provision was there and all of the opinions cited in the decision of the state court, down to and including the railroad cases in 35 Wisconsin, 425, were a part of the adjudicated laws of the state at the time when the franchise in question was granted and constituted the laws and fixed the rights of the plaintiff in error under the franchise at the time it was so granted and accepted and became a part of such franchise contract; and in the volume of the Wisconsin Reports in which the case of Madison, Watertown and Milwaukee Plank Road Company case was reported, in 3 Wis. 287, at the close of that opinion on page 296 was a long note or brief written by ex-Chief Justice Dixon, (who was actively connected with the early history of the state and was familiar with the proceedings of the Constitutional Convention and the purpose of the state in putting into the state constitution the so-called reserve power provision, and that note and brief states very clearly the general purpose and effect of the so-called reserve power on franchises and charters granted by the state, and cites a large number of cases to the general proposition, and while such note was not a part of the decision in that case, it was in the printed volume of the Wisconsin Reports for the information of the plaintiff and all parties at the time its franchise was granted and was a clear summary of the decisions construing the constitutional provisions. It reads as follows:

"The power reservd to the legislature by section 1, art. XI, of the constitution, to alter or repeal all general laws or special acts by which corporations without banking powers are created, **is an unrestricted one,** save only that the legislature may not destroy vested rights of property, nor defeat or essentially impair the object of the grant, that is, it may not under

the guise of amendment, change the substantial purpose for which the corporation was created, or transform it from a corporation of one kind into a corporation of another kind or one the object of which is materially different from that originally created. It may change the crporation as such at pleasure, **and whatever rights or franchises are given by the legislature, the same may be modified or taken away by subsequent legislative amendment or repeal. All such rights and franchises are received, held and exercised, solely upon the faith of the sovereign grantor, and during its pleasure.**

Pratt vs. Brown, 3 Wis., 603, 611-12-13;
Nazro vs. Ins. Co., 14 Wis., 295;
Whiting vs. Sheboygan, etc., Railroad Co., 25 Wis., 201, 207;
Chapin vs. Crusen, 31 id., 214-215;
West Wisconsin Railway Co. vs. The Supervisors of Trempeleau County, 34 Wis., 197;
Commonwealth vs. Essex Co., 13 Gray, 239;
Roxbury vs. Boston & Prov. Railroad Co., 6 Cush., 424;
Fitchburgh Railroad Co. vs. Grand Junc. Railroad Co., 4 Allen, 198;
Commonwealth vs. Eastern Railroad Co., 103 Mass., 254;
Mayor, etc., of Worcester vs. Norwich & Worcester Railroad Co., 109 Mass., 103;
Parker vs. Metropolitan Railroad Co., id., 506;
Commissioners, etc. vs. Holyoke Water Power Co., 104 Mass., 446;
4 Gray, 234;
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The State ex rel. vs. Mayor, etc., id., 575;
Reed vs. Frankfort Bank, 23 Maine, 318;
Oldtown, etc., Railroad Co. vs. Veazie, 39 id., 471;
Meadow Dam Co. vs. Gray, 30 id., 545;
Wilson vs. Tesson, 12 Ind., 286;
Shearman vs. Smith, 1 Black., 587;
Home of the Friendless vs. Rouse, 8 Wal., 430;
Washington University vs. Rouse, id., 439;
Pennsylvania College Case, 13 id., 190;
Miller vs. The State, 15 id., 478;
Holyoke Co. vs. Lyman, id., 500;
Olcott vs. The Supervisors ,16 id., 678, 694;
Tomlinson vs. Jessup, 15 id., 454;
Perrine vs. Oliver, 1 Minn., 202;
Saye vs. Dillard, 15 B. Mon., 347;
Louisville vs. President, etc., id., 642;
Gardner vs. Hope Ins. Co., 9 R. I., 194 (11 Am. R. 238), 319;
State vs. Railways, 15 Sept., 1874."

At the time of the granting of the franchise in question, the state legislature had not enacted any general law under the reserve power in the constitution, so it was proper for the parties to this franchise to make a contract provision of the character contained in the franchise, which would be operative until the legislature took action under such reserve power, but the reserved power in the legislature under the provisions of section 1, article XI of the state constitution was the supreme law of the land at the time the franchise was granted and entered into and became a part of it just as much as though it had been written into the franchise in question, and such constitutional reserve power operated as a qualification upon the express provisions of the franchise as granted, and the subsequent exercise by the legislature of such reserve power cannot be regarded as an act "impairing the obligation of contracts" within the meaning of section 1 of article XI of the Constitution of the United States.

Attorney General vs. Railroad Companies, 35 Wis. 425; 12 Fed. Stats. Ann. 792-2.

Milwaukee E. R. & L. Co. vs. R. R. Com.; 153 Wis. 592-625.
State vs. Railway Co.'s, 128 Wis. 449—on page 505.

Prior to 1907 municipalities in Wisconsin, as in many other states, were created by the legislature under special charter acts and were usually given the general power to grant franchises for public utility services, under section 959-49, Statutes of 1898, but they were not given the power and it was found that they could not effectively exercise the power of supervision and control over such franchises, that it was deemed advisable and necessary to prevent abuses. Under such delegated power, municipalities would often grant franchises to several corporations for the same kind of public service, which naturally had the effect to cripple each for efficient service, and long franchises were often granted by mere towns, villages or small cities, where it was impossible at the time to foretell what would be the growth or development of such municipalities or their needs for such service during such franchise terms, and to remedy such evils, chapter 499 of the Laws of 1907 was adopted by the state creating sections 1797m-1 to 1797m-108, which created the railroad commission of Wisconsin, with quasi judicial powers of supervision, regulation and control over public service corporations, and by section 1797m-76 of that law it was provided that "Every license, permit, or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of Section 1797m-1 to 1797m-109 and subject to the provision that the municipality in which the major part of its property is situated may purchase the property of such public utility actually used and useful for the convenience of the public at any time as provided herein, paying therefor just compensation to be determined by the commission and according to the terms and conditions fixed by said commission." And it also provided that any public utility in the state operating under an exising franchise could surrender such existing franchise and take in lieu thereof an indeterminate franchise under such public utility law, but such right was left optional with the franchise holder, and while many franchises were so surrendered, it was usually in cases where the term of the franchise was about to expire, or where the special franchise pro-

visions were not especially favorable to the corpo tion, and it was found that many existing franchises, presumably those containing the most drastic conditions against the municipality, like the franchise in question, were not so voluntarily surrendered, which necessitated courts continuing to try many cases involving the construction of such special franchise provisions, which decisions would, in many cases, have no bearing or effect upon cases involving other and different franchise provisions, and in order to harmonize and make all franchises in the state uniform and common and to do away with all such separate franchises and seperate franchise provisions, the legislature, in 1911, by chapter 396, enacted what is now section 1797m-77 of the Wisconsin statutes, which provides that "Every license, permit, or franchise granted prior to July 11, 1907, by the state, or by the common council, the board of aldermen, the board of trustees, the town or village board, or any other governing body of any town, village, or city, to any corporation, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, authorizing and empowering such grantee or grantees to own, operate, manage, or control any plant, equipment, or any part of a plant or equipment within this state, for the conveyance of telephone messages, or for the production, transmission, delivery, or furnishing of heat, light, water, or power, either directly or indirectly, to or for the public, is so altered and amended as to constitute and be an indeterminate permit within the terms and meaning of sections 1797m-1 to 1797m108, inclusive, and shall have the same force and effect as a license, permit, or franchise granted after July 11, 1907, to any public utility embraced in and subject to the provisions of said sections 1797m1 to 1797m108, inclusive, except as provided by section 1797m-80."

That exception in section 1797m-80 provides that as to such involuntary indeterminate permits in case the municipality should determine to condemn and acquire such plant, the necessity for such taking should be first determined by the verdict of a jury in an action brought in the circuit court, which was done as to this plant as soon as the injunction action was dismissed. This provision was no doubt made because of the provisions of section 1, Article XIV of the United States

Constitution, which provides that "Nor shall any state deprive any person of life, liberty, or property without due process of law." By other sections of that law it is provided that in case any municipality shall determine to acquire the properties of any such public utility whether operating under a voluntary or involuntary permit, it may do so by a proceeding before the Railroad Commission to have the property appraised and valued; the only difference in the proceedure being that in cases of involuntary indeterminate permits as provided in said law there is the provision (on account of the constitutional requirement) that the necessity for such taking shall be first determined by a jury as provided for by section 1797m80, and it further provides that the title to the property shall be vested in the municipality upon payment of such appraised valuation.

The City of Superior, in 1918, both by vote of the council and the electors determined to acquire this water plant under the provisions of section 1797m-79-3 and 1797m80 of that law, upon the theory and assumption that it was then operating under the involuntary indeterminate permit provisions of that law. (T. P. 2.)

It is claimed that this so-called involuntary indeterminate permit provision of the state statutes is invalid under the provisions of the federal constitution, section 10, Article 1, which provides that "No state shall * * * pass any * * * law impairing the obligation of contracts." That constitutional provision was early construed and its effect determined in the case of Dartmouth College vs. Woodward, 4 Wheaton 518, where it was held that a contract provision in the charter franchise of that college could not be impaired by subsequent legislative act, but the court in that case in the opinion of Justice Story, pointed out that if such power and right was reserved in the state constitution that such reserve power would be implied in all franchise cnotracts thereafter granted under it, and because of such intimation, and because it was considered to be a necessary result of such a reservation, especially as to domestic corporations, the committee which drafted the Wisconsin constitution, composed of some of the leading lawyers of the territory and the then judges of the Supreme Court of the territory, put into the state constitution the so-

called reserve power provision in section 1, Article XI, which provides that "Corporations without banking power or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be obtained under general laws. **All such general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage.**"

That provision was not put into the Wisconsin constitution as an act of hostility to the Federal government, but rather following the suggestion of the Supreme Court in Justice Story's opinion in the Dartmouth College case, and it was so done to reserve the power in the legislature over corporations, which it was considered necessary in order to prevent hardships or abuses resulting from long indiscreet franchise contracts, granted, in many cases, by public officers at times when they could have no way of telling what the future growth, developments and necessities of the municipality might justify or make necessary for the public convenience and good, of which the franchise involved here is a good illustration, where a mere village by its first ordinance attempted to tie up the future generations of the municipality for sixty years to an arbitrary valuation of its property and toll services that might have no proper relation to the actual value of its property during such term, and from the fact that this corporation is so insistent that the city shall take over and pay for its property on the basis of this arbitrary franchise valuation price rather than at its actual appraised value as it will be determined by the Railroad Commission of Wisconsin justifies the assumption that such arbitrary franchise valuation is largely in excess of its actual value as it is assumed it will be determined by the Railroad Commission, which is the most equitable and just method of determining the actual value that the experience of ages has suggested, so that there is no attempt made either by the Wisconsin laws or the proceedings of the City of Superior to deprive the Water Company of its property without due process of law and paying therefor just and full compensation.

The history of the legislation in Wisconsin and of the adjudicated cases shows that under the constitution the power

of granting charters or franchises was a legislative power vested in the legislature where it could be exercised either by direct act or delegated to municipalities, and it has been exercised in both ways at different times. The first case that came before the state supreme court was that of Madison, Watertown and Milwaukee Plank Road Company vs. Reynolds, 3 Wis. 287, where the legislature of the territory, by direct act, incorporated the plaintiff company and in the act of incorporation provided that such franchise might be amended by the legislature, and the court held, that being a provision in the grant that it was accepted subject to such reserve right and it could be changed or altered by any subsequent state legislature.

After Wisconsin became a state under its constitution with the reserve power therein, the effect of such constitutional reserve power came before the court the first time in the case of Pratt vs. Brown, 3 Wis. 603, and the court in that case, which was composed of judges who had had to do with the drafting of the state constitution and were familiar with the rule in the Dartmouth College case and with the suggestions in the opinion of Justice Story, that such power might be reserved in the state constitution, which was done in the constitution of Wisconsin, and the court in that case reviewed at some length the history and purpose of the reserve power in the constitution of the state and gave full effect to such reserve power, and from that decision down to the present time the courts of Wisconsin have construed the reserve power in the constitution as entering into and becoming a part of all charters and franchises granted in the state, either by direct act of the legislature or under delegated power by the municipality.

In the early history of the territory and state corporation charters and franchises were granted direct by the legislature as in the case of Madison, Watertown and Milwaukee Plank Road Company vs. Reynolds, 3 Wis. 287, but as the state developed it was found that practice was too burdensome on the legislature, so general laws were passed, dividing the powers into charters and franchises, or as it is designated in the opinion of the supreme court in this case, into primary and secondary franchises. The primary franchise being granted

by a charter so called, issued by the Secretary of State under certain prescribed conditions. The secondary franchise being granted, usually by a municipal corporation under powers delegated by the legislature, and that practice was followed for many years, until experience showed the dangers and evils resulting from the practice of municipalities granting such secondary franchises, when the legislature withdrew that right from the municipalities by making all franchises in the state involuntary permits under section 1797m-76, and vested the power in the state Railroad Commission.

Both the history of this legislation and the decisions rendered thereunder by the state court show the purpose of the state in adopting and enforcing the reserve power in the constitution was to preserve the power in the state to control at all times public corporations and public franchises whether granted direct by the state or through delegated power to municipalities. Following is a list of the cases where different features of the question were passed upon by the Wisconsin court prior to the time of the granting of the original franchise to the plaintiff in error.

Madison, Watertown & Milwaukee Plank Road vs. Reynolds, 3 Wis. 287.
Pratt vs. Brown, 3 Wis. 603.
Nazro vs. Merchant's Mutual Insurance Co., 14 Wis. 295.
Kenosha Ry. Co. vs. Marsh, 17 Wis. 13.
Whiting vs. Sheboygan & Fon du Lac Ry. Co., 25 Wis. 167.
State vs. Milwaukee G. L. Co., 29 Wis. 454.
Chapin vs. Crusen, 31 Wis. 209-215.
West Wis. Ry. Co. vs. Trempeleau Co., 35 Wis. 251.
Attorney General vs. R. R. Cos., 35 Wis. 426.
State ex rel. Cream City R. Co. vs. Hilbert, 72 Wis. 184.

These cases are analyzed in the opinion of the state court in this case.

Some of these decisions involved so-called primary franchises and some of them secondary franchises, and several of

them discuss at length the history, purpose of and reasons for the reserve power in the constitution of Wisconsin. In case of Kenosha Ry. Co. vs. Marsh, 17 Wis. 13, the court says: "The occasion of reserving such a power either in the constitution or in charters themselves, is well understood. It grew out of the decisions of the supreme court of the United States, that charters were contracts within the meaning of the constitutional provision that the states should pass no laws impairing he obligation of contracts. This was supposed to deprive the states of that power of control over corporations which was deemed essential to the safety and protection of the public. Hence the practice, which has extensively prevailed since those decisions, of reserving the power of amending or repealing charters. It was solely to avoid the effect of the decisions, that the charter itself was a contract between the state and the corporation, so as to enable the state to impose such salutary restraint upon these bodies as experience might prove to be necessary."

In the case of Whiting vs. The Sheboygan and Fon du Lac Ry. Co., 25 Wis. 167, which was a rate case, a motion for rehearing was granted and in the decision on such rehearing the court goes exhaustively into the question of regulation and fixing of rates and the right to condemn and take property, and while it expressly recognizes the binding effect of the decisions of the supreme court, it criticizes the rule of the Dartmouth College case upon the theory that it practically destroys the power of eminent doman over corporate property, but the court then says on page 198, "**But be this matter as it may in other states, the question can never arise in this state. Our people, by a most wise and beneficent provision in their constitution, have perpetually reserved the power in the legislature to alter or repeal all charters or acts of incorporation at any time after their passage.** Constitution, Art. XI, Section 1. In this state, therefore, the public has that use which has been held to justify the exercise of the power.

"The legislature, if it has not done so, may limit the tolls and fares to be received by the railroad company to a reasonable sum, beyond this the company shall not go." At the time of that decision the legislature had not yet acted under the

constitutional reserve power and the court further says, "The time may come when the legislature will be imperiously required to exert it; and when it does, if ever, it will not be to deprive the croporation or its stockholders of their legitimate rights, but to correct abuses and save the rights of the people."

This franchise was granted and accepted under that warning, and while the term of the original franchise was fixed at thirty years, with a provision for its renewal for another thirty years, yet, the company was appraised not only of the reserve power in the constitution, but warned by the decisions of the court that the legislature might at any time be required to exercise its right under such reserve power.

Duluth Street Ry. Co. vs. Railroad Com. 161 Wis. 245.

In the case of West Wis. Ry. Co. vs. Trempeleau Co. 35 Wis. 257, the court says: "If proper force and effect are given to this constitutional provision, it would seem to afford ample authority for the enactment of the repealing statutes above cited, as it reserves the right to the legislature to amend and revoke all corporate **franchises and privileges** which it might grant. * * * The object and historical origin of the provisions in the constitution of this state are matters known to all professional men. They were, through this paramount authority, to retain and secure to the state **full power** and control over corporate **franchises, rights and privileges** which it might grant,—a power and control which the state was in a measure deprived of by the federal constitution, as that instrument had been interpreted in the celebrated Dartmouth College case." That reasoning would apply just as much to the so-called secondary franchise as to the primary franchise and whether granted by the state direct or by a municipality exercising delegated power, and it is referred to as "franchise."

The case of Attorney General vs. Railroads, 35 Wis. 425, was decided in June, 1874, and was the last decision before the granting of this franchise in 1887 and the court there again refers to the rule in the Dartmouth College case and the question of whether or not it might be changed by this court, and says: "'Be that as it may, the rule in Dartmouth College vs. Woodward stands, and we must all yield to it while it does

stand. Neither this nor any state court can destroy or evade it while the court which established it may see fit to adhere to it. * * * We have given some history of the rule, and of its application and its mischief, not for the purpose of combatting it, but for the purpose of showing the significance and **scope of the reserved power over corporate charters in our state constitution.** For the very purpose of that reservation of power was to exclude the rule from all application to corporate charters in this state, **and to restore to the state all its otherwise inherent authority over its own corporaions.***__*__* This is a quesion of state law, not of federal law. We give full scope to the federal constitution as interpreted by the federal courts, but we stand clearly outside of both. This question could be brought within the Dartmouth College rule, not by interpretation of the federal constitution, but by interpretation of the state constitution only. * * * The reserved power in our consitution is a positive provision entering into all charters under it and must be construed as it is written. * * * and we must be guided in our construction of the words used, if the words will admit of it, by the purpose of the provision, to do away in this state with the rule in the Dartmouth College case so far as it relates to charters of private corporations. * * * **These defendants took their franchises, and their creditors invested their money, subject to the reserved power, and suffer no legal wrong when that is exercised.** * * * That was a condition under which they chose to hold their property; and they have no right to complain when the condition is enforced. * * * **Valid alterations of a charter, under the reserved power, would bind the corporation, whether assented to or not.** * * * **One consequence undoubtedly is, that the corporation cannot conduct its operations in defiance of the power that created it;** and ifit does not accept the modification or amendment proposed, it must discontinue its operations as a corporate body." Here again the words "franchise" and "charter" are used as coming within the purpose of the constitution.

As to one of the railroad companies, it did not appear from the records whether the corporation was formed and its charter franchise accepted under the territorial act or under the state constitution, and the court on page 592 says: "If,

indeed, that charter was not accepted and the corporation under it was organized before the adoption of the state constitution, a grave question would arise as to the effect of the reserved power in the state constitution upon the charter accepted and the corporation organized, after that instrument had gone into operation." But on a re-hearing it was shown that the railroad company in question was organized before, but its charter was not accepted until several months after the adoption of the state constitution, and on page 606 the court says; on such re-hearing, referring to the reserve power in the constitution: "The whole section, taken together, signifies clearly, not only that no charters should be passed, but also that no corporations should be formed, not subject to the reserved power. * * * It was quite competent for the state constitution to have repealed all laws of the territory which had not ripened into contracts, under the rule in Dartmouth College vs. Woodward, 4 Wheaton, 518. So was it competent for it to adopt them. So, also, to adopt them sub modo. This last is what the constitution did. * * * **Indeed the whole provision for alteration or repeal is nugatory, except so far as it has relation to charter contracts within the Dartmouth College rule; for all other laws would be subject to repeal without any provision for it."**

That is what we claim here. If it does not come within the rule of the Dartmouth College case, the legislature has the right to change it without the constitutional power. If it does come within that rule, then under the reserve power in the state constitution, the legislature has that right and it could not be contracted away, and it makes little difference whether you call it a charter or a franchise, or a primary franchise and a secondary franchise, as it all comes from the state either directly or indirectly, and in this particular case it looks as though the so-called secondary franchise was granted both ways, for the primary franchise act in section 8 (T. P. 6) grants the right to construct and lay pipes, conduits, aqueducts and other works of machinery in the streets, highways, roads, lanes and public places, etc., in what is now the City of Superior.

We have referred to these cases in the state court prior

to the granting of the franchise in question, and particularly the later cases because they enter into and limit the proisions of the franchise in question, and they as well as the constitutional provision would be as much a part of the franchise conditions as though referred to by it or written into it.

State vs. Madison St. Ry. Co., 72 Wis. 612.
Milwaukee E. R. & L. C. vs. R. R. Com., 153 Wis. 626.

This corporation selected the manner and place of its creation and accepted its charter and franchise and all its rights from and under the state of Wisconsin where power and control over it and all its rights were so carefully reserved in the constitution itself, and it is difficult to understand how it can now seriously claim that when it made this franchise contract it did not know of this reserve power or its effect upon the provisions of its franchise, but whether it actually knew or not, it would be bound by the provisions in the constitution. Courts often construe laws, including constitutional provisions, different than some people expected them to be construed, but they are bound by such provisions as so construed by the courts. That is the fundamental theory of all governments.

The decisions of the state supreme court after the franchise in question was granted cannot be said to have entered into the franchise contract in the same sense that the prior decisions would, but the Wisconsin court has continued to construe the rights of persons and corporations under the constitution and to give full effect to the reserve power therein, both as to so-called primary and secondary franchise rights, the same as it did before this franchise was granted, only the general rule has been more clearly established because of repeated adjudications which are referred to and analyzed in the decision of the state court in this case, and until this case came up, it seems to have been generally recognized as one of the established rules of law in the state of Wisconsin. That idea was expressed very clearly in the opinion of the court in the case of State vs. Railway Co'.s 128 Wis. 449, on page 505, where the court says: "No one will doubt but what the grant of a charter and its acceptance creates a contract between the grantor and grantee, or but what after such acceptance the contract could be changed by the legislature under the reser-

vation of authority in that regard in the constitution which is regarded as written in every corporate charter."

THE RULE OF THE UNITED STATES COURT.

A review of the decisions of the Supreme Court of the United States shows that the same rule is now clearly established by the decisions of this court and we believe the question has been so frequently passed upon by this court and other courts that it ought now to be the established law of this court. It has been said that "No provision of the constitution of the United States has received more frequent consideration by the Federal Supreme Court than this one. This very frequency would appear to have rendered it difficult to apply the result of the court's deliberation to new cases differing somewhat in their facts from those previously considered."

6 Ency. of U. S. Dec. 764.

Charter rights held subject to such reservation are not protected by the contract clause of the constitution.

Mo. Pac. Ry. Co. vs. State, 216 U. S. 262, 30 Sup. Ct. 330.

Where the power to regulate fracnhises and impose conditions is reserved, no question as to the impairment of the obligations of the contract can arise if the legislative authorities choose to impose additional burdens upon the enjoyment of the franchise.

Sioux City St. Ry. Co. vs. Sioux City, 138 U. S. 98.
2 McQuillan Mun. Cor. 763.

The reserve power to alter or amend will be construed most favorably to the public.

2 McQuillan Mun. Cor. 763.
Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679.
Danville Water Co. vs. Danville, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696.
Covington vs. Ky., 173 U. S. 239.

Vieuville Water Co. vs. Mobile, 186 U. S. 220.
Rogers Park Water Co. vs. Fergus, 180 U. S. 624, Sup. Court 490, 45 L. Ed. 702.

The constitution of Ohio, Art. XIII, Section 2, provides that corporations may be formed under general laws, but that all such laws may, from time to time, be altered or repealed. The contract inhering in the charter of a power company as distinguished from its property acquired under the charter was subject to the state reserve power to amend or repeal and if necessary to justify a city's act in appropriating water from certain rivers under act of May 17, 1911, authorizing it to do so, such act may be treated as an amendment of the power company's charter making its rights subject to those of the city.

Ramapa Water Co. vs. N. Y., 236 U. S. 579.
Sears vs. City of Akron, 38 Sup. Ct. 245.

All contracts of a municipal corporation are subject to and affected by a subsequent legislative act or municipal ordinance, wherever the constitution provides that no irrevocable privileges shall be granted or the right of repeal or change is reserved in the grant or contract itself.

12 Corpus Juris 632.

No question can arise as to the impairment of the obligation of a contract when a corporation has accepted all of its corporate powers subject to the reserve power of the state to modify its charter and to impose additional burdens upon the enjoyment of its franchise.

12 Fed. St. Ann. 792 (2).

The exercise of the power reserved to the legislature to regulate, by its own act or through the instrumentality of a municipality, the rates to be charged by a water company supplying such municipality and its inhabitants with water so as to require such company to charge reasonable rates only for water supplied does not deprive such company of its property without due process of law, nor does it impair the obligation of a contract between it and the city for higher rates where

such company was created and such contract was made subsequent to the adoption of the constitution of 1885 having a reserved power in it.

Tampa vs. Tampa Water Works Co. (Fla.), 34 So. Rep. 631.

Where the constitution of a state reserves the right to impair, alter or amend charters of corporations all charters granted by the legislature ares ubject to such provision and therefore are wanting in that attribute which is essential to bring them within the intendment of the clause of the constitution of the United States protecting contracts from impairmen.

8 Fed. St. Ann. 795 (b).
Northern Cent. R. Co. vs. Md., 187 U. S. 267.
Bondholders vs. R. R. Com., 3 Red. Case No. 1-625.
Tampa vs. Tampa Water Works Co., 34 So. Rep. 631.
Frishie vs. Fogg, 78 Ind. 269.
Phinney vs. Sheppard, 88 Md. 633.
Jackson vs. Walsh, 75 Md. 304.
State vs. Northern Cent. R. Co., 44 Md. 131.
Miller vs. State, 15 Wall (U. S.) 478.
Vieuville Water Sup. Co. vs. Mobile, 186 U. S. 220.
Lincoln St. R. Co. vs. Lincoln, 61 Neb. 109.

Where the reserve power is in the constitution it is held that it is unnecessary to reserve the power of alteration, amendment or revocation in any statute of incorporation and the legislature cannot divest itself of the power even if it would undertake to do so by the most express words.

Com. vs. Hock Age Mut. Benefit Assn., 10 Philadelphia, (Pa.) 54.
31 Leg. Int. 245.

The corporation by accepting the grant subject to the power so reserved by the constitution must be held to have assented to such reservation.

Hamilton Gas Light, Etc. Co. vs. Hamilton, 146 U. S. 270. Affirming 37 Fed. Rep. 832.

Board of Education vs. Board of Education, 76 My. App. 355.

Under the laws of Minnesota which authorize an assessment insurance company to change its business to that of a premium basis, such a change was held not to be a violation of the constitution.

Wright vs. Minnesota Mutual Life Insurance Co., 193 U. S. 675.

Where the constitution of New York contained the provision that corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and in cases where in the judgment of the legislature the objects of the corporation cannot be attained under general laws, and all general laws and special acts passed pursuant to this section may be altered from time to time or repealed; it was held that the effect of such a provision, whether contained in a constitution or in a general law subject to which a charter was accepted is at the least to reserve to the legislature the power to make any alteration or amendment of a charter or franchise which will not defeat or substantially impair the objects of the grant or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purposes of the grant or to protect the rights of the public, or the corporation or its stockholders or creditors, or to promote the due administration of its affairs, and it is immaterial whether the power to alter the charter is reserved in the original act of incorporation or in the articles of association or under a general law, or in a constitutional provision in force when the corporation was formed or when the law was made.

Looper vs. Magnard, 179 U. S. 46.
Polk vs. Mutual Reserve Fund, 207 U. S. 310-325.
Mutual Life Ins. Co., 193 U. S. 657.
6 Ency of U. S. Dec. 764.

Where the constitution reserved to the legislature full power to prevent excessive charges by persons and corporations performing services of a public nature and the legisla-

ture after a contract was made empowering a municipality to prescribe maximum reasonable charges for water, it was held that an ordinance lowering such rates did not impair the obligations of the contract made between the adoption of the constitution and the passing of the legislative act, and it was also there held that the construction of the Florida courts, that such right in the legislature was inalienable would be followed by the United States court.

Tampa Water Works Co. vs. Tampa, 199 U. S. 241, 50 L. Ed. 173.
6 Ency. of U. S. Dec. 819.
East Hartford vs. Hartford Bridge Co., 10 How. 511, 3 L. Ed. 518.

That is the exact situation involved in this case and the rule of the state court should be applied here especially as this corporation is a creature of the State of Wisconsin.

The constitution of the United States, Section 10, Art. 1, regarding the impairment of the obligation of contracts is not violated by a state statute authorizing a city to acquire by condemnation the franchise, reservoir, machinery, etc., of a water company, even though the city has an unexpired contract with the water company to purchase water from it for twenty-five years at a fixed sum per year. The constitutional guaranty of just compensation is not a limitation of the power to take, but a condition of its exercise. The prohibition against the law impairing the obligation of a contract does not stay the power of eminent domain.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.
6 Ency. U. S. Dec. 830.

That is the theory under the Laws of Wisconsin, for the Wisconsin statute provides, section 1797m80, fora jury trial to determine the necessity for such condemnation to satisfy the provisions of Section 2, Art. XI, State Constitution, and Art. V, U. S. Constitution, and such a trial has been had and the necessity found.

A general reservation in the state law of power to alter, revoke or repeal a corporate franchise becomes a part of such franchise and need not be expressly so stated in such franchise.

Milwaukee E. R. & L. Co. vs. R. R. Com., 153 Wis. 592-626.
State vs. St. Maries' etc., Petroleum Co. 58 W. Va. 108, 51 Se 865. 1 L. Ra (NS) 558.
In re: College Hill, etc., Assn., 108 Pac. 681.
3 Foster's Fed. Pr. Sec. 692.

The rule is well settled that judicial decisions construing the constitution or laws of the state are a part of the laws of such state.

6 Ency. of U. S. Dec. 774.
3 Foster's Fed. Pr. Sec. 692.

The action of a municipal body in granting a franchise is legislative in character and can only cover such rights as the council had power to grant.

Lange vs. La Crosse & E. R. Co., 118 Wis. 558.
State ex rel. Kenosha G. & E. Co. vs. Kenosha E. & R. Co., 145 Wis. 337.

All franchise grants must be strictly contrued in the interests of the public and for the preservation of the powers of the government.

Detroit Citizens' St. Ry. Co. vs. Detroit R. Co., 171 U. S. 48.
Ruggles vs. Ill., 108 U. S. 526.
R. R. Com. Cases, 116 U. S. 307; 6 Sup. Ct. 334.
Home T. & T. Co. Los Angeles, 211 U. S. 265.
Georgia R. & B. Co. vsfl Smith, 128 U. S. 174.
Stone vs. Farmers' L. & T. Co., 116 U. S. 307.
Freeport W. Co. vs. Freeport, 180 U. S. 587.
Danville W. Co. vs. Danville, 180 U. S. 619.
Knoxville W. Co. vs. Knoxville, 189 U. S. 434.

In the case of M. E. R. & L. Co. vs. R. R. Com., 153 Wis.

592, on page 607, the court, speaking of the rate making power, says: "Clearly the legislature should not part with the power even for a limited time, except upon the most potent and convincing considerations. No presumption can be indulged in that it has parted with the power, nor will doubtful words be construed as having that effect. He who asserts that the state has surrendered any part of its sovereign power even temporarily in his favor must prove the fact by the most convincing evidence. The presumption if any there be must be the other way."

M. E. R. & L. Com., 153 Wis. 592.

The attempt, sometimes made by courts to differentiate between so-called charter and franchise rights, is discussed in the opinion of the state court in this case (T. P. 49) and for convenience of discussion the court names them the "primary" and "secondary" franchises. The "primary franchise," the right to exist as a corporation, was formerly granted by the legislature or through some department of the state, while the "secondary franchise," the right to do business in the streets of the municipality was formerly delegated to and granted by the municipality as a so-called franchise, but in later years this has been largely withdrawn from the municipality and is now being exercised largely as so-called indeterminate permits or franchises granted by the legislature through the Railroad Commission or other state department. A good illustration of this may be found in Section 1778 of the Wisconsin statutes where the state exercises the "secondary franchise" power direct as to telegraph, telephone, heat, power and electric light companies. Section 1778-1 provides: "Any corporation formed under this chapter to build and operate telegraph or telephone lines or systems for the transmission of heat, power or electric light for public purposes, or to conduct the business of telegraphing, telephoning or transmitting heat, power or electric light for public purposes may, subject to all reasonable requirements and regulations made by any city or village through, across or adjoining which said line, lines or systems may be proposed to be constructed, construct and maintain any such lines or systems with all necessary appurtenances, from point to point, upon, in, along, across or beneath the sur-

face of any public road, highway or bridge or any stream or body of water, or upon the land of any owner consenting thereto, and from time to time to extend the same at pleasure and for such purposes may also acquire lands, or any interests therein in the manner provided in this act; and may connect and operate its lines or systems with the lines or systems of any person or corporation engaged in like business within or without this state, and charge reasonable rates for the transmission and delivery of messages or the furnishing of heat, power or electric light for public purposes."

This change has been a necessary result of the change and development in the character of the service furnished by such companies, which was formerly largely local, whereas, it is now largely inter-municipal and interstate, and would be of but little benefit to the public if it could be held up or stopped and required to get a local franchise from each municipality, and we believe it is perfectly proper that courts as well as legislatures should construe laws liberally with reference to these changed conditions, and they have very generally met that requirement.

Where the right to revoke, alter or repeal corporate franchises is reserved, a subsequent statute authorizing cities and villages to erect gas works, or otherwise supply themselves with gas, cannot be regarded as impairing the obligation of a contract existing between the municipality and a corporation to supply the municipality with gas, and it is immaterial what the motive for taking may be, or how harshly such legislation may operate upon the parties to the contract.

6 Ency. of U. S. Sup. Ct. Rep. 801.
Hamilton Gas, Light, etc., Co. vs. Hamilton City, 146 U. S. 258; 63 L. Ed. 963.
Walla Walla City vs. Ill., 96 U. S. 63; 24 L. Ed. 657.
Wright vs. Minnesota Mutual Life Ins. Co., 193 U. S. 657.

Where a state constitution retains in the legislature the right to amend or appeal, there can be no impairment of a contract obligation made with a public utility company by a su

sequent law authorizing municipalities to build such plants for such purpose, even though such franchise contract was an exclusive one.

Hamilton Gas, Light, etc., Co. vs. Hamilton City, 146 U. S. 258-266; 36 L. Ed. 963.
2 McQuillian, Minn. Corp. 823.

A conveyance to the United States of a bridge over the navigable waters forming the international boundary for a purpose not connected with the administration of the government, where the bridge was constructed under legislative authority from the state of New York, did not affect the authority of the state under its reserve power to amend he bridge company's charter to require it to build a roadway for vehicles and a pathway for pedestrians on that part of the bridge in the state of New York.

International Bridge Co. vs. N. Y., 254 U. S. 126; 41 Sup. Ct. 56, affirming 223 N. Y. 137; 119 N. E. R. 351.

In volume 1 of Foote & Everett's Law of Incorporated Companies operating under municipal franchises will be found an extensive review of the principle of the constitutional reserve power, and on page 153, the authors, after referring to the fact that it is sometimes held that the rule in the Dartmouth College case was in decadence, say: "This alleged decadence seems to be rather the result of this fact, i. e., that all or nearly all of the states since that decision have incorporated into their fundamental law, provisions reserving to the legislature of the state, the power to do what that decision decided could not be done if not reserved, or they have inserted these provisions into charters granted, or have enacted general statutes to the same effect. It is also true, that the courts have limited the principles laid down in that case more strictly with the growing importance of corporate organizations and enterprises.

That a contract properly entered into by the parties concerned may reserve to one of the parties the privilege and right to make changes and alterations in its provisions, and by

special agreement be, outside of this provision of the United States constitution as interpreted by the Dartmouth College case, need not be discussed. A charter accepted with such a provision or at the time of the existence of a valid general enactment, constitutional o rstatutory, to that effect is subject to such reservation and may be altered, etc. Such a reservation gives to the grant in this respect some of the properties of a license rather than a franchise, but if such reservation is not made the power does not exist." And on page 155 the authors say: "It is believed, therefore, that, where the power to alter, amend, or repeal has been reserved, the power of the legislature is plenary to supervise and control the exercise of all the rights and privileges granted, and that this extends to the regulation and control of the organization of the company, to the methods of construction of the plant, to the inspection of the construction and service, and to the regulation of price of service; it may impose new and additional burdens on the privileges granted and may confer the power to so regulate and control upon local authorities, and may withdraw privileges granted."

THE LAW OF EMINENT DOMAIN.

This court has now settled the law that under the power of eminent domain franchise contracts are property and subject to the law of eminent domain.

All private property is held subject to the demands for a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted, and hence, the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it: All may be taken for public use upon payment of just compensation. * * * The contract is a mere incident of the tangible prop-

erty. **A contract is property and like any other property may be taken under condemnation proceedings for public use.**

Long Island Water Supply Co. vs. Brooklyn, 17 Sup. Ct. Rep. 718, citing

New Orleans Gas Co. vs. Louisiana Light & Heat, 115 U. S. 650; 6 Sup. Ct. 252.

1 Foot & Everett on The Law of Incorporated Companies Operating Under Municipal Franchises, 156 et seq.

It was further held in that case, explaining the case of Hall vs. Wisconsin, 103 U. S. 5, that that decision only insisted that the contract could not be taken for public use without condemnation and payment of just compensation therefor the same as any other property of the company.

Id. P. 720.

In Wisconsin the franchise is condemned and appraised the same as any other property of the company.

Hill et al. vs. Antigo Water Co., 3 Wis. Railroad Com. Report, 623, 730.

Appleton vs. Appleton Water Works Co., 5 Wis. Railroad Com. Rep. 215, 218.

In re. Cashton Lt. & P. Co., 3 Wis. Raliroad Com. Rep. 67, 85-86.

Superior Commercial Club vs. Superior W., L. & P. Co., 10 Wis. Railroad Com. Rep. 704.

In this last case it appears the franchise was valued at $1,000,000. (See tables on pages 718 and 730.)

States cannot by virtue of the impairment clause of the constitution be held to have divested themselves by contract of the right to exert their governmental authority in matters, which from their very nature, so concern such authority, that to restrain its exercise by contract would be a renunciation of the power to legislate for the preservation of society or to secure the performance of essential governmental duties, and the right to exercise the power of eminent domain upon

payment of just compensation for a public purpose is so governmental in character as to come within that doctrine.

Contributors to Penn. Hosp. vs. Philadelphia et al., 245 U. S. 20; 38 Sup. Ct. Rep. 35.
Polk vs. Mutual Reserve Fund, 207 U. S. 325.

This court has recently said, **"There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters, which from their very nature, so concern such authority, that to restrain its exercise by contract would be a renunciation of the power to legislate for the preservation of society or to secure the performance of essential governmental duties."**

Contributors to Penn. Hosp. vs. Philadelphia, 38 Sup. Ct. Rep. 35, Citing
Beer Company vs. Mass., 97 U. S. 25; 24 L. Ed. 989.
Stone vs. Mississippi, 101 U. S. 814; 25 L. Ed. 1079.
Butchers' Union Co. vs. Crescent City Co., 111 U. S. 746.
Douglas vs. Ky., 168 U. S. 488; 18 Sup. Ct. Rep. 199.
Manigault vs. Springs, 199 U. S. 473.
Texas and New Orleans R. R. Co. vs. Miller, 221 U. S. 408.

The court then says "It is unnecessary to analyze the decided cases for the purpose of fixing the criteria by which it is to be determined in a given case whether a power exerted is so governmental in character as not to be subject to be restrained by the contract clause, since it is equally true that the previous decisions of this court leave no doubt that the right of a government to exercise its power of **eminent domain** upon just compensation for a public purpose comes within this general doctrine."

Contributors to Penn. Hosp. vs. Philadelphia, 38 Sup. Ct. Rep. 35. Citing
Charles River Bridge Co. vs. Warren Bridge Co., 11

Pet. 420; 9 L. Ed. 773.

West River Bridge Co. vs. Dix, 6 How. 507; 12 L. Ed. 535.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 650. 6 Sup. Ct. Rep. 252; 29 L. Ed. 516.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; 17 Sup. Ct. Rep. 718; 41 L. Ed. 1165.

Offield vs. Ry. Co., 203 U. S. 372; 27 Sup. Ct. Rep. 72; 51 L. Ed. 231.

Cincinnati vs. Louisville & N. R. Co., 223 U. S. 390; 32 Sup. Ct. Rep. 267; 56 L. Ed. 481.

The court then said: "The principle upon which the contention under the constitution rests, had been at the time the case was decided below conclusively settled to be absolutely devoid of merit, **it follows that a dismissal for want of jurisdiction might be directed.**

Equitable Life Assurance Society vs. Brown, 187 U. S. 308-314; 23 Sup. Ct. Rep. 123; 47 L. Ed. 190.

Consolidated Turnpike Co. vs. Norfolk, etc., Ry. Co., 238 U. S. 590-600, 33 Sup. Ct. Rep. 605, 57 L. Ed. 982.

Manhattan Life Ins.Co. vs. Cohen, 234 U. S. 123-137, 34 Sup. Ct. Rep. 874, 58 L. Ed. 1245."

But it was then said that "In view, however, of the course of the proceedings below and the aspect which the case took as resulting from those proceedings without departing from the rule settled by the cases referred to, we think our decree may well be one, not of dismissal but of affirmance, and it was accordingly affirmed."

Contributors to Penn. Hosp. vs. Philadelphia, 38 Sup. Ct. Rep. 35. End of Case.

That case ought to cover practically all the questions involved in this case and if there are any questions in this case not covered by that decision, they are certainly covered and decided adversely to plaintiff in error in the case of Long Island Water Supply Co. vs. City of Brooklyn, 166 U. S. 685; 17 Sup. Ct. Rep. 718.

There the town of New Lots, in 1881, made a twenty-five year contract with the water company to pay a stipulated price per hydrant. In 1886 the town was annexed to Brooklyn by act of the legislature, which act required such hydrant rentals to continue to be paid by that part of the city until the city purchased the plant which the act authorized to be done, and the city was not to establish any competing plant during the term, but was given power to purchase or condemn within two years, which it did not do. In 1892 the legislature authorized Brooklyn to conedmn the plant, franchise, etc., and each was appraised separately in such condemnation proceedings and it was there claimed that the state by its subsequent act impaired the obligation of the contract, but the court there held that all private property is held subject to the demands of a public use and that the constitutional guaranty of just compensation is not a limitation upon the power to take, but a condition of its exercise and that whenever the public uses require it, the government may appropriate any such private property on the payment of just compensation. That the supply of water to a city is a public purpose can not be doubted, and hence the condemnation of a water-supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, **or what franchises are connected with it; all may be taken for public uses upon payment of just compensation.**

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685, 17 Sup. Ct. Rep. 718.

The court was in that case urged to distinguish between the property and the franchise or so-called contract features so as to bring the contract features of the franchise within the federal constitution against the impairment of a contract, but the court there says that such a rule would be far reaching, because "There is probably no water company in the land which has not some subsisting contract with a municipality which it supplies, and within which its works are located; and a ruling that all those properties are beyond the reach of the power of eminent domain during the existencse of its contract is one which, to say the least, would require careful considera-

tion before receiving judicial sanction." The court then holds that such a franchise or contract is property and like any other property may be taken under condemnation proceedings for public use.

> Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685, 17 Sup. Ct. Rep. 718-720.
> New Orleans Gas Co. vs. Louisiana Light & Heata Producing & Manufacturing Co., 115 U. S. 650-673; 6 Sup. Ct. Rep. 257.

Its condemnation is, of course, subject to the rule of just compensation, and that is all that is implied in the decisions, such as Hall vs. Wisconsin, 103 U. S. 5.

The court then says: "The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public use and after showing that in the condemnation proceedings the tangible property and the franchise contracts were both appraised, the court says: **"In other words the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value."** And the court further says with reference to the prohibition against the impairment of contracts, "Yet with this concession constantly yielded, it cannot be justly disputed that in every political community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; but they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage to the whole of society. This power, denominated the **'eminent domain of the state'** is, as its name imports, **paramount to all private rights vested under the government,** and these last are by necessary implication, held in subordination to this power, and **must yield in every instance to its proper exercise."** The court further says that **"Every contract is made in subordination to them, and must yield to their control as conditions inherent and**

paramount, whenever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition." And in answer to the claim there made of a difference between the power of a government to appropriatae for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise, the court says: "The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in the cases. * * * We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property, and nothing more." And the court there held that it makes no difference to the rule whether the plant or water works system was wholly for fire and other municipal purposes or whether it was in part for the supply to the public, and as to such public supply, whether it was to be made absolutely free or should be charged for by the city, which would specifically cover the situation in the proceedings contemplated by the City of Superior, and that case also sustains the features of this law which provides for the commissioners assessing the value or damages instead of a jury where an appeal to the courts was provided for in the law, which is permitted in the Wisconsin Railroad Commission law by Section 1797m-83, which provided: "Any public utility, or the municipality, or any bondholder, mortgagee, lienor, or other creditor of the public utility, being dissatisfied with such order may commence and prosecute an action in the Circuit Court to alter or amend such order or any part thereof as provided in Sections 1797m-64 to 1797m-73, inclusive, and said sections so far as applicable shall apply to such action."

INTERSTATE INTERESTS.

By its seventh assignment of error the plaintiff in error questions the right of the city to acquire its plant because a part of it is located in the State of Minnesota, and by this ob-

jection, the plaintiff in error places itself in a peculiarly inconsistent position, because it is seeking in this action to compel the city to purchase and acquire its property, including that part of it in the State of Minnesota, and we submit if it can compel the city to purchase, take over, hold and operate its plant as it seeks to do by this action, then it must necessarily follow that the state having created this corporation and having jurisdiction of it can acquire and operate its plant as it has been constructed by the company to serve the purpose for which it was created by the state under the laws of the state, and the opinion of the state court on this phase of the case and the decisions cited in the opinion on the motion for a rehearing (174 Wis. 292) are sufficient to sustain the right. We submit the rule is sustained by both state and federal decisions.

This question, we think, is fully covered and conclusively answered in the opinion of the state court on the motion for rehearing and the cases there cited, see (T. P. 64) but we will add the following:

The property of a water company used to supply water to a city and its inhabitants is regarded as a single plant or property in so far as it is used and necessary for the purpose of serving the public.

6 Ency. of U. S. Dec. 830.

In acquiring and operating a water works system for furnishing water to the city and to its inhabitants a city does not act in its governmental capacity, but acts in its proprietary capaciy.

Eau Claire Dells Improvement Co. vs. Eau Claire, 179 N. W. 4.
Piper vs. Madison, 140 Wis. 311.

In the exercise of its proprietary powers a city has a wider field and may go beyond its limits to purchase property and to use the same for municipal purposes.

Schneider vs. Menasha, 118 Wis. 298.
Landgon et al. vs. Walla Walla et al., 193 Pac. 1.

In maintaining water works and supplying water to the city and its inhabitants the city acts in its proprietary capacity as distinguished from its governmental capacity, and in so doing it may, generally speaking, exercise such powers as a private concern engaged in a like business may exercise. In their business matters municipal corporations are governed by much the same rules as private concerns.

Eau Claire Dells Improvement Co. vs. Eau Claire, 134 U. S. 548.
4 McQuillan Mun. Cor. 1794-24.
3 Abbott's Mun. Cor., 892.
Henedrson vs. Young, 119 Ky. 224; 83 S. W. 583.

In exercising its proprietary functions a city stands in the same position and exercises its functions in the same manner as ap rivate corporation or an individual.

8 McQuillan Mun. Cor. 2167-14.
Mulligan vs. Miles City, Mont. 404; 153 Pac. 276.

It is so seldom that a water supply can be obtained within the limits of a city that a mere grant of power to provide and supply water to the city and its inhabitants will be construed to give the power to acquire for that purpose water supplies outside of the city.

4 McQuillan Mun. Cor. 788-74.
South Pasedena vs. P. L. & W. W. Co., 152 Cal. 179.

It is a well recognized rule that municipalities may purchase or otherwise acquire property outside of their limits where it is found to be necessary for use in connection with plants or properties for municipal service.

4 McQuillan Mun. Cor. 1718.
Hibbard vs. Barker, 84 Kan. 848; 115 Pac. 561.
3 McQuillan Mun. Cor. 1108.

The rule that a city cannot exercise its governmental authority outside its limits does not preclude its purchasing and owning land outside its limits.

3 McQuillan Mun. Cor. 1108-29.
Schneider vs. Menasha, 118 Wis. 298.

A statute authorizing a city to construct a public bridge across a river into another state has been held valid as an exercise of proprietary power.

4 McQuillan Mun. Cor. 1108-34.
Hanssler vs. St. Louis, 205 Mo. 656; 103 S. W. 1034.

It has been held to be a city purpose to purchase a supply of water outside the city and convey it into the city for use, and for that purpose a city debt could be created; such improvements are for the common and general benefit of all the citizens and have been regarded as within the scope of municipal powers.

3 McQuillan Mun. Cor. 410. Note.
State ex rel. Murphy vs. Kelly, 76 N. Y. 488.

A bridge leading into a city from another state might be of as great advantage to the city as it would be if located wholly within the corporate limits and it is generally recognized as an authorized power of a city to build and operate such a bridge.

Matter of Mayor of New York, 99 N. Y. 569.
Pittsburg vs. Brace, 158 Pac. 174.
Newman vs. Ashe, 9 Baxt. Tenn. 380.
Minnesota Land Co. vs. Billings, 111 Fed. 972.
Chambers vs. St. Louis, 29 Mo. 543.
Hoffner vs. St. Louis, 161 Mo. 34; 61 S. W. 632.

A city may be authorized to purchase water works or property for a water system, part of which is beyond the territorial limits of the city.

Omaha Water Co. vs. Omaha, 162 Fed. 225.
West Hartford vs. Hartford Water Co., 44 Conn. 360.
State vs. Franklin, 40 Kan. 410.
Newman vs. Ash, 9 Baxt. (Tenn.) 380.

The Wisconsin statutes, Section 1797m-79-3 expressly authorizes the municipality to conedmn and acquire the plant including the part outside of the state.

If a city in its proprietary or business capacity has the same power as other business corporations like this water company to acquire and operate a water plant for the use of the city and its inhabitants, then surely this city, in its proprietary capacity has the same power to acquire this water supply where it is made a necessary part of the plant as constructed by this company no matter where it is located, for the plant is practically worthless without its supply.

This company has been charging to and collecting rates from both the city and its inhabitants under the Wisconsin railroad commission laws on the basis of the value of its entire plant, as appraised by the Wisconsin Railway Commission, including that part located in Minnesota, and it has appraised the value of its supply properties in Minnesota in figuring its rates, and the Wisconsin Commission has fixed its rates on such total valuations, (Superior Commercial Club et al. vs. Superior W., L. & P. Co., 10 Wisconsin Ry. Com. Rep. 704) and if the city has, in its proprietary capacity, the same power as the private corporation, it may do the same thing, and surely this Wisconsin corporation is in no positioin to question that right where it has been charging rates on the value of such properties, and is seeking now to compel the city to buy the whole plant including that part in Minnesota.

8 McQuillan Mun. Cor. 2167-14.
Mulligan vs. Mills City, 153 Pac. 274.

The objection that has been made to the municipality acquiring that part of the plant outside of the state upon the ground that the judgment or order of the Railroad Commission could not vest the title in the city to that part of the plant outside is not serious, nor does it indicate a limitation upon the power. Section 1797m-95 of the Wisconsin Statutes provides that if any public utility shall violate any provision of Section 1797m-1 to 1797m-109, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided, or shall fail, neglect, or refuse to obey any law, requirement or order made by the commission, or the municipal council, or any judgment or decree made by any court upon its application, for each such violation,

failure or refusal, such public utility shall forfeit or pay to the treasurer a sum not less than $25.00, nor more than $1,000 for each offense, and sub. (2) of that section makes the failure of any officer or servant of such public utility the failure of the utility, and Section 1797m-98 makes each day's failure to comply with any order or direction of the commission a separate offence, so that under these provisions of the Railroad Commission law, if in the proceeding to be had before the Railroad Commission to acquire this property, the Railroad Commission should find it necessary in order to vest the whole plant in the city to order the plaintiff corporation to execute and deliver to the city a deed of conveyance for that part of the plant located in Minnnesota, it would have the power to do so and would have the power under that provision of the statute to enforce odedience by the proper penalty, forfeiture or other remedy found to be necessary to enforce compliance.

Section 1797m-82 of the Wisconsin Statutes provides that the Commission shall by order fix and determine * * * just compensation to be paid for taking of the property of such utility "actually used and useful" for the public, and "all other terms and all conditions of sale and purchase which it shall ascertain to be reasonable." Under that provision "the property * * * actually used and useful" certainly means the property as constructed by the utility and the supply is certainly the most essential part of the plant 'actually used and useful" and certainly the power to determine and order "all other terms and all conditions of sale and purchase which it shall ascertain to be reasonable" ought to give to the Railroad Commission ample power to determine and order done whatever in its judgment under the particular circumstances ought to be done, or what was found necessary to be done in order to vest in the city the title to the entire plant as constructed by this utility company. If in this case he Railroad Commission should determine it was reasonable and necessary on account of the peculiar condition and location of the plant to require the execution and delivery to the city of a conveyance of certain properties forming a necessary part of the plaintiff's plant, then certainly, under the language of that statute, it could order and require that to be done as one of the "reasonable terms and conditions of the sale and purchase"

and sub.div. (3) of that Section provides that upon the filing of the certificate of the Commission with the City Clerk, the

and with the title to that part of the property outside of the city vested in the city in its proprietary capacity the city could hold and operate the plant in the same manner that this Wisconsin corporation does, without exercising any governmental power or functions either within or without the state.

8 McQuillan Mun. Cor. 2167-14.
Henderson vs. Young, 119 Ky. 224.

And certainly the city cannot be compelled in this action to take over this property where a part is located in the State of Minnesota if it has not the power in its proprietary capacity to hold and operate it.

The sovereign power of the state, by which is meant, the people of the state in their sovereign capacity, have the power of eminent domain over all the property **and property rights** within the state of whatever nature, corporeal or incorporeal, and by whomsoever owned, and when a property like this water plant serving the public is attached to a water supply outside of the state so that the plant cannot serve its purpose without such supply, then that supply and the right to it is certainly a "property right within the state."

Kennebec Water District vs. City of Waterville et al., 8 Mun. Cor. Cases 358; 52 Atlantic Rep. 754.

The fact that there is a mortgage upon this property does not affect the right to condemn or acquire it because the mortgage is a mere incident to be considered in the appraisement of and payment for the plant.

Kennebec Water District vs. City of Waterville, 52 Atlantic Rep. 752; 8 Mun. Cor. Cases 553.

Section 1797m-3 of the Wisconsin Statutes provides that "Every public utility is required to furnish reasonably adequate service and facilities. The charges made by any public utility for any heat, light, water or power produced, transmitted, delivered or furnished, or for any service rendered or to be rendered in connection therewith shall be reasonable and just," and the Railroad Commission is authorized under the

Wisconsin Commission law to fix rates based upon the reasonable value of the service, and for a plant located as the plaintiff's is it will be seen that this plaintiff has been charging and collecting from the city and its inhabitants rates for furnishing water with this plant upon the valuation of the entire plant, including that part located in Minnesota, and the Railroad Commission of Wisconsin has valued the whole plant, including that part of the plant located in Minnesota, for the purpose of fixing rates both to the city and its inhabitants. (Superior Commercial Club vs. S. W., L. & P. Co., 10 Wis. R. Com. Rep. 704.) And the company should now be stopped from trying to prevent the city and the Railroad Commission from considering appraising and taking that part of its plant located in Minnesota as a necessary part of its plant and system which it has built up in the city for serving the public.

This question is of increasingly serious importance, especially in certain localities. The City of Superior is a good illustration. Separate franchises were granted to this corporation for furnishing to the city and its inhabitants water, gas and electricity, and for years such products were so furnished by plants located wholly within the state and city. Then each plant was connected up with a source of supply outside of the state, and if that can be done to keep the municipality from acquiring or controlling and regulating the plant and service, then surely the reserve power in the constitution is of very little practical value, and neither the state nor any municipality, especially those located on or near the bundary, can safely grant franchises for any public service or permit such right to be so exercised.

RIGHT TO MAINTAIN THIS ACTION.

This action was brought to enjoin the city from bringing an action or proceeding to acquire the water plant and property of the plaintiff in error and one of the principal grounds urged was that the Railroad Commission of Wisconsin had no jurisdiction of that part of the plant located in Minnesota. There should be no question but what both the courts and the Railroad Commission would have jurisdiction of that part of the

plant located in Wisconsin, and if that is true, then this form of action simply presents the question of whether an injunction can be maintained by a person threatened with a suit to limit the prayer for relief in such threatened action. The mere fact that the plaintiff in an action prays for too much relief or for some relief to which he is not entitled is no grounds for refusing him the relief to which he is entitled.

Younkin vs. Milwaukee L. H. & T. Co., 120 Wis. 477.

A court of Equity ,may, under certain circumstances enjoin what may result in a multiplicity of suits or prosecutions like Schlitz Brewing Co. vs. Superior, 117 Wis. 297, but to attempt, by injunction action, to limit the prayer for relief in a threatened action is a new and novel use of the injunctional writ, and if that can be done, then any person threatened with suit on any claim where the amount of the indebtedness was in dispute could bring an action to enjoin the claimant from asking for judgment for more than the amount admitted and in any event that would not be grounds for Federal jurisdiction.

In view of the fact that all of the alleged Federal questions involved in this case have been so clearly and conclusively established against the claims of the plaintiff in error by many decisions of this and other courts, we submit this motion should be granted and the writ and action in this court should be dismissed as without merit and we so move the court.

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For copy of motion see next page.

MOTION TO DISMISS.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1922.
No. 436.

SUPERIOR WATER LIGHT & POWER COMPANY,
Plaintiff in Error,

vs.

CITY OF SUPERIOR AND F. A. BAXTER, AS MAYOR; AND C. N. O'HARE AND F. C. TOMLINSON, AS COMMISSIONERS OF THE CITY OF SUPERIOR,
Defendants in Error.

The defendants in error in the above entitled action move the court, upon the records and proceedings, to dismiss this action, appeal and writ for the reasons and upon the grounds that there are no merits therein and no unsettled federal questions or constitutional questions involved therein; that the same constitutional questions have been passed upon by this court in many cases and the law fully established and adjudicated against the rights of the plaintiff in error, so that no such constitutional, federal or jurisdictional question involved in such writ of error is now an open or unsettled question in this court, and the plaintiff in error is hereby notified that the defendants in error will, on the 19th day of Feb, 1923, at the opening of court on said day, move the court at the Court Rooms in the City of Washington, for an order and judgment dismissing said action and appeal for the reasons and upon the grounds stated, and as more fully shown in the brief served herewith.

T. L. McINTOSH,
C. M. WILSON,
Attorneys for Defendants in Error.

To:

GRACE, FRIDLEY & CRAWFORD,
Attorneys for Plaintiff in Error.
HARRY L. BUTLER,
of Counsel for Plaintiff in Error.